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In the Supreme Court

of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED FREIGHTWAYS, INC., and OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.,

Appellants,

vs.

PIERCE AUTO FREIGHT LINES, INC., LOS ANGELES-SEATTLE MOTOR EXPRESS, ANGELO COLLETTI, Doing Business as COLLETTI FAST FREIGHT, PACIFIC MOTOR TRUCKING COMPANY, and PACIFIC SOUTHWEST RAILROAD ASSOCIATION,

BRIEF OF APPELLEES

On Appeal from the District Court of the United States for the District of Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND

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BRIEF OF APPELLEES

On Appeal from the District Court of the United States for the District of Oregon.

NATURE OF THE CASE

By this appeal, review is sought of a decree of a specially constituted District Court of the United States, hereinafter referred to as "the court below", suspending an order of the Interstate Commerce Commission, hereinafter referred to as the "Commission",

in an action brought by appellees against appellants to set aside such order. The Commission's order granted certificates of public convenience and necessity for extension of operations of two motor carriers.

REFERENCE TO REPORTS OF PREVIOUS OPINIONS

The opinion of the court below (63) is reported in 57 F. Supp. 192. The report of the Commission contains the notation: "This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission." It is attached to and make a part of the complaint. (9-44)

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix "A" to this brief.

JURISDICTION OF THIS COURT

The jurisdiction of this court is conferred by the Act of October 22, 1913, Ch. 32, 38 Stat. 220 (Judicial Code, Sec. 210, 28 U.S.C.A., Sec. 47a) (Appendix, p. 108)

STATEMENT OF THE CASE

On December 27, 1939, Consolidated Freightways, Inc., hereinafter referred to as "Consolidated", a motor carrier then operating from Portland, Oregon, to Medford and Klamath Falls, in southern Oregon,

filed an application with the Commission for a certificate of public convenience and necessity authorizing extension of its operations from these southern Oregon points to San Francisco, California, all as provided in Sections 206(a) and 207 (a) of Part II of the Interstate Commerce Act (49 USCA, Sections 306(a) and 307(a)), (Appendix, p. 111), hereinafter referred to as the "Act". Like applications covered various other routes not here involved but which were heard jointly with the Medford and Klamath Falls cases.

On January 26, 1940, Oregon-Nevada-California Fast Freight, Inc., hereinafter referred to as "O.N.C.", a motor carrier then operating from San Francisco, California, to Medford and Klamath Falls, filed an application with the Commission for a certificate of public convenience and necessity authorizing, in general, extension of its operations from these points to Portland, Oregon, all as provided in Sections 206(a) and 207(a) of the Act.

It is a significant historical fact that at the beginning of the Commission proceedings and for many years prior thereto Consolidated had operated from Portland, Oregon, through to Medford, Oregon, and Klamath Falls, Oregon, over U. S. Highway 99 and its connections, and O.N.C. had operated from San Francisco, California, to Medford, Oregon and Klamath Falls, Oregon, at which points traffic moving between Oregon and California points had been inter-

changed. During 1938 the President of Consolidated formed a "Freightways" organization for the ostensible purpose of facilitating the interchange of traffic and urged O.N.C. to participate therein, advising O.N.C. that failure to do so would result in an application by Consolidated for operating rights from Oregon points into San Francisco. This threat was carried out in the Consolidated applications above described and O.N.C. countered with its application to operate from Medford and Klamath Falls to Portland, and to serve certain off-route points, including Vancouver, Camas and Washougal, Washington.

Pursuant to Sec. 205(a), the Commission referred the applications of Consolidated to a joint board, as defined in Sec. 203(a) (4) of the Act. The Commission also referred the application of O.N.C. to a joint board.

The applications of Consolidated were heard before Joint Board No. 5 of the Commission; the application of O.N.C. before Joint Board No. 11. Both hearings began July 8, 1940. Appellees, among others, appeared at said hearings as protestants. The proceedings were not consolidated; the hearings were separate and separate records were made therein. Some testimony was stipulated from one record into the other. The record in each proceeding was closed on October 28, 1940.

Neither of the Joint Boards could agree upon the

conclusions or recommendations which should be made to the Commission and the proceedings were thereupon referred to an examiner of the Commission, pursuant to Sections 205(b) and 17(10) of the Act (49 USCA Secs. 305(b), 17(10)).

Section 207(a) of the Act requires a certificate to be issued to a qualified applicant therefor "if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity". It will be observed that the statute requires findings with respect to two different matters: (1) applicant's fitness, willingness and ability to perform; and (2) the present or future public convenience and necessity.

The examiner issued his report and recommendations in Consolidated's case on September 16, 1941. With respect to public convenience and necessity the examiner found:

> "The evidence is convincing that existing carriers are adequately equipped, able and willing to serve the needs of all of the shippers within the territory involved in an efficient manner, and that they are able and willing to provide additional equipment when needed. While the shipper witnesses desire a more expedited service, the

record does not disclose that they have been put to a lot of inconvenience, or have sufferent damages to a material extent as a result of the present services. Most of the shippers' complaints about the present services has to do with interchange between applicant and O.N.C. at Medford, a matter within the power of these two companies to correct. The fact that they have been unable to mutually agree upon such arrangements as would eliminate the difficulties complained of, is not sufficient justification to warrant the granting of authority to applicant to invade the territory of existing carriers, and deprive them of business which they rightly should enjoy.

"The examiner finds that * * * applicant has failed to show that either the present or future public convenience and necessity require the services proposed by it within the considered territory; and that the applications should be denied."

The examiner also pointed out that there were several motor carriers and rail and express carriers over the route for which Consolidated sought certificates and that for many years Consolidated and O.N.C. had theretofore given joint through service.

The examiner issued his report and recommendations in O.N.C.'s case, also on September 16, 1941. The report indicates thorough consideration of the evidence. With respect to public convenience and nenessity, the examiner found:

"The evidence is convincing that existing carriers except on rare occasions, have been able to serve the needs of the shipping public in an efficient manner, and that they are able and willing

to provide additional, suitable equipment when needed. No business is expected to be operated at one hundred per cent perfect, nor is it possible for the existing carriers to anticipate all of the needs of the shippers. While the fast service proposed by applicant would be beneficial to the shippers, they have suffered little damage by use of the schedules of existing carriers, although they have been put to some inconvenience by the use thereof. The evidence indicates that it is the policy of existing carriers to rearrange their schedules and their operations in general to meet changing conditions in the transportation industry when brought to their attention. By reason of their established operations, they should be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, without added competition of a new operation.

"With respect to the interchange at Medford, the evidence indicates that the difficulties therewith could be largely, if not entirely eliminated by closer cooperation between applicant and Consolidated. While the arrangement of schedules to provide different arrivals and departures would eliminate a lot of the delay at Medford, it is not considered by them to be practical or economical, because of insufficient tonnage. Exchange of all equipment at Medford would also eliminate delays, and prevent damage to freight from rehandling. Evidence of the inefficiency of the joint line services of applicant and Consolidated has little probative value in determining whether public convenience and necessity require the proposed service.

"The examiner finds that applicant has failed to show that either the present or future public convenience and necessity require the service proposed by it within the considered territory: and that the application should be denied."

The examiner also pointed out that there were several motor carriers and rail and express carriers over the route for which O.N.C. sought certificates and that for many years Consolidated and O.N.C. had theretofore given joint through service.

Each applicant filed exceptions to the order proposed by the examiner. O.N.C., as a part of its exceptions, petitioned for a rehearing. In support of the requested rehearing, O.N.C. contended:

> "The instant record was closed on October 31, 1940. Over a year has passed since that time. Many changes have occurred in the volume and flow of traffic. Many changes have occurred in operating conditions. Many changes have occurred in the physical operations of the applicant having a direct bearing upon the instant application. It is respectfully urged that a full and proper consideration of the application requires bringing these facts and factors into the record * * * *." *(2484)

On March 1, 1943, the combined report embracing both proceedings, which report is the subject of this litigation, was filed by Division 5 of the Commission, consisting of Commissioners Mahaffie, Rogers and Patterson, Commissioner Rogers dissenting.

The report of Division 5 referred to the separate reports of the examiner and said:

> "The issues in these proceedings are interrelated and the applications will be disposed of in one report." (10)

* NOTE: Unless otherwise indicated, figures in parenthesis indicate pages of the printed record.)

The Division thereupon proceeded to consider and comment upon the contents of the combined records, treating them in all respects as a single record, explaining its action by stating in its topic headed "Discussion and Conclusion":

> "For reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley route." (39)

The factual conclusions of the Comission, which were intermingled with recitals of evidence, treated the two proceedings as a common cause. Upon several controversial and controlling issues doubt was expressed as to the true facts, but the opinion was expressed that the Commission "should give applicants the benefit of any doubts". (40, also see 29) Upon the issue of fitness, an affirmative finding was made as to O.N.C. but none as to Consolidated. (40)

On the issue of public convenience and necessity the Commission found, in substance:

(a) A number of shippers desire the proposed single line service which would enable them to obtain goods more rapidly; (b) Traffic is increasing; (c) Pierce Auto Freight Line, Inc., renders daily through single line service between all points involved, but most shippers were not aware of that fact; (d) Other carriers operate over the route whose operations are restricted or whose service to intermediate points is negligible; and (e) "it would be difficult to conclude

that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair the operations of existing carriers as to be contrary to the public interest. * * * " (39-40) These findings will be treated in detail at a later point. Finally the Commission said:

> "In its exceptions, O.N.C. also requests a further hearing, but in view of our conclusions herein it is doubtful whether it would still desire such further hearing. Its request for further hearing is hereby denied. * * * " (41)

The Commission then found as an ultimate fact as to each applicant "that the present and future public convenience and necessity require operation" over the so-called Valley routes, and that each applicant was "fit, willing and able properly to perform such service and to conform to the requirements of the Act and our rules and regulations thereunder". (41)

The Commission then issued its order dated March 1, 1943, that the "Applications, except to the extent granted herein, be, and they are hereby denied, effective April 19, 1943". (45)

It is pertinent to point out that the hearings were begun two years and nine months prior to the issuance of the report and order and were concluded two years and four months before the issuance of the report and order.

It is a significant historical fact that at the time the applications of Consolidated and O.N.C. were

filed and until after the conclusion of the hearings thereon, seven pioneer carriers were conducting operations between Portland and San Francisco. (18) Of these seven carriers, the operating rights of only one had been definitely determined by the Commission. The operating rights of the remaining six were before the Commission for consideration and action on "grandfather" applications filed under Section 206 (a) of the Act. Most of these carriers had pending and undetermined applications for additional rights to authorize service to additional points or otherwise enlarge the scope of their operations. Subsequent to the conclusion of the hearing and prior to the decision on the Consolidated and O.N.C. applications the uncertainties of most of these pioneer operations were removed by final determination of their operating rights.

The following chronology of events is summarized from the report of the Commission in the Consolidated - O.N.C. cases or from its official reports in the cases referred to:

April 30, 1940, Pacific Motor Trucking Company was authorized to control and operate Pacific Truck Express, which held the only issued certificate over the Portland - SanFrancisco routes. 38 MCC 687 (21)

October 18, 1940, pursuant to the temporary authority granted under Sec. 210 a (b), System Freight Service leased the properties and claimed "grand-

father" rights of Cascade Fast Freight and commenced operations between Los Angeles and San Francisco on the one hand and Portland on the other, with service at certain intermediate and off-route points. On April 15, 1941, the Commission in 36 MCC 601 authorized the merger of the operating rights and properties of System and Cascade. (21)

June 14, 1941, in *Los Angeles-Seattle Motor Express, Inc., Extension* 29 MCC 81, pending at the time of these hearings, public convenience and necessity were found to require operation by the company named between San Francisco and Portland, among other points, with service to principal intermediate points, such as Salem, Eugene, Roseburg and Medford. (18)

August 15, 1941, Pete Lubetich, whose claim of rights under the "grandfather" clause had previously been denied, was issued a certificate covering commodities requiring refrigeration between Seattle and Los Angeles serving certain intermediate points, including Portland, Medford, Sacramento, Stockton and San Francisco, which permit was transferred to Pacific Coast Motor Freight on November 25, 1941, by authority of a Commission decision reported at 29 MCC 669 (22-23).

March 16, 1942, O.N.C. was granted temporary authority to operate the properties of Transcontinental Common Carriers, holding certain operating rights

from North Bend, Marshfield, Coquille, Bandon and Langlois, Oregon, and San Francisco and Oakland over U. S. Highway 101 and serving as a common carrier of canned goods, groceries, paraffine, salt, fresh fruits and vegetables from Oakland and San Francisco to North Bend and intermediate points over U. S. Highway 101. September 5, 1942, purchase of such operations by O.N.C. was authorized. (26)

April 17, 1942, Colletti Fast Freight was issued a certificate of public convenience and necessity by decision reported in 32 MCC 363, service at San Francisco restricted to dairy products, poultry and fresh, frozen or canned fruits, vegetables and fish from specified Oregon and Washington points but not including Portland or any other Oregon point on U. S. Highway 99, with authority, however, to transport general commodities, with certain exceptions, between Seattle and Los Angeles serving certain intermediate and off-route points including Fresno, Sacramento and Modesto, California, and Portland, Medford, Grants Pass, Roseburg, Eugene and Salem.

April 25, 1942, the operating rights of Pierce Auto Freight Lines, Inc., which had theretofore been the subject of several controversial proceedings, were determined in 30 MCC 629. (21) This order, however, was attacked in the courts and upheld by the United States District Court for the District of Oregon by decision of October 30, 1942. (*McCracken, et al v. U. S.*, 47 F. Supp. 444)

The operating rights of O. J. Mitchell, claimed under Docket MC 35525 were the subject of heated controversy throughout the period between the close of the hearings and the entry of the order in the Consolidated and O.N.C. cases but were not finally determined until a later date. (33 MCC 683) However, on Oct. 28, 1940, shortly before the close of the hearings in the Consolidated and O.N.C. cases, Consolidated Freightways, under temporary lease authority, took charge of the Mitchell operations and inaugurated a through service under authority of the combined rights of Consolidated and Mitchell between Portland and San Francisco. Authority for the purchase of Mitchell by Consolidated having been denied in 36 MCC 623, Mitchell assumed control of his operation and the through service was then conducted by Consolidated and Mitchell under equipment lease arrangement whereby Consolidated shipments moved over the route of Mitchell from Southern Oregon points to San Francisco under lease to Mitchell, thus providing a through service without transfer of lading.

In August and September, 1942, hearing was had on the application of O. J. Mitchell in Docket MC 35525 Sub. 6, to permit continuance of service over his claimed "grandfather" route. The unreported decision of the Commission in that docket recites that at the time of the hearing this carrier was operating seven line haul vehicles in his single line service, and

ten or twelve line haul vehicles daily in each direction in interchange operations with Consolidated.

Similarly, O.N.C., under temporary authority, assumed control of Oregon Express, which held operating rights from Los Angeles and San Francisco to Portland, Oregon, via U. S. Highway 101 to Crescent City, thence via Grants Pass and U. S. 99 to Portland. By the use of the rights of Oregon Express and the purchase of a local line between Medford and Grants Pass, O.N.C. inaugurated a through service between Portland and San Francisco via U. S. 99 shortly following the close of the hearing in the Consolidated and O.N.C. cases. Purchase of the rights of Oregon Express by O.N.C. was later approved by the Commission in 39 MCC 355.

September 26, 1942, in *Oregon Express-Extension-Alternate Routes*, (not published in MCC reports) heard January 29, 1942, the Commission reviewed the scope and character of service then being afforded between Portland and San Francisco over the identical routes involved in the Consolidated and O.N.C. proceedings, found that the public was being adequately served, that existing carriers were able and willing to afford any added service which might later be required, that the joint service of applicant and O.N.C. had not been shown to be deficient and that public convenience and necessity did not require added service. (113, 2614)

March 1, 1943, the Commission made its report in the Consolidated-O.N.C. cases, and on records closed October 28, 1940, arrived at its contrary conclusion, which appellees challenged in the District Court.

April 10, 1943, appellees, who were protestants in the proceedings before the Commission, filed a petition for reconsideration, further hearing and a postponement of the issuance of the certificates.

The petition of appellees for a rehearing and reconsideration was based on grounds, among others, as follows: (1) that the Commission's findings with respect to public convenience and necessity were in conflict with findings on that issue by the Commission in other proceedings relating to the identical routes and service wherein the hearings were closed at a later date; (2) that the Commission erroneously and improperly considered, in each proceeding, evidence not admitted therein; (3) that the Commission erroneously assumed that if it granted one application, it must grant the other; (4) that alleged inefficiencies and defects in the joint-line service of the applicants were not a sound basis for the order; (5) that the order was erroneous because there was no finding that existing carriers were not ready, willing and ble to provide the service; and (6) that the controlling statements of fact in the Commission's report were, at the time of filing the petition, and at the time of issuance of the report, untrue because of the many changes which had occurred after close of the

hearings on the applications, which changes appelles offered to prove. (110, 2485)

August 2, 1943, the Commission denied the petition without opinion. Two years and nine months expired after close of the hearings before the denial occurred.

September 7, 1943, a certificate of public convenience and necessity was issued to Consolidated. (45) A similar certificate was issued to O.N.C. on September 15, 1943. (47)

January 13, 1944, pursuant to 49 USCA, Sec. 305(g), and 28 USCA, Sec. 41 (28) (see also 28 USCA, Secs. 46, 48), appellees brought this action against the United States, praying that the findings, order and certificates issued by the Commission be set aside. The Commission intervened as provided in 28 USCA, Sec. 45(a). The cause was heard by three judges as provided in 28 USCA, Sec. 47.

The grounds of attack were, in brief: (6-7)

1. The Commission misconceived its statutory powers and exceeded its authority in treating two records as one, thereby considering in each proceeding evidence not of record therein, and in commingling its conclusions in the separate proceedings in a single report in such manner as to make it impossible to determine which record is depended upon to support a given conclusion or to which proceeding the respective finding and conclusions are applicable.

2. The Commission's conclusions and order were based upon the unsound premise that the granting of one application necessarily required the granting of the other, without regard to how much, if any, added service was required by public convenience and necessity.

3. In extending the "benefit of doubt" to each applicant on controversial issues, the Commission improperly waived the statutory requirement of proof.

4. The conclusions of the Commission are not supported by findings concerning the ability or willingness of existing carriers to serve the territory adequately.

5. There is no finding that the granting of the applications, or either of them, will not impair the services of existing carriers, nor would the record sustain such a finding; but the commission, on later records, denied other applications involving the identical routes on the ground that impairment to existing carriers would result from loss of traffic.

6. The Commission erroneously held that inefficiencies in the joint line service of the two applicants, resulting from their inability or refusal to agree, established public convenience and necessity for the duplication by each applicant of the service of the other.

7. The decision was predicated upon a record so stale as to fail to reflect the tremendous war-time

changes transpiring in the two years and nine months which elapsed between the opening of the hearing and the making of the order.

8. The Commission on later hearings in another proceeding which was decided earlier, involving identical routes and service, (Docket MC 18231—Sub. 4) found public convenience and necessity had not been shown to require added service, that there was no showing that the interchange service of these two applicants had not satisfactorily met the public need, and affirmatively approved the adequacy of existing service and the competence and ability of existing carriers to properly handle all available traffic.

9. The findings are wholly insufficient to support the order.

The court below found, among other things:

(1) The only questions considered in the hearings before the Commission were (a) whether or not any through-line operation between San Francisco and Portland should be allowed; and (b) if so, which of the two separate applications should be allowed; (Finding IX, p. 78)

(2) No notice was given to anyone that the question as to whether or not *both* applications should be granted and there was no evidence to support the Commission's finding that the present and future public convenience and necessity required issuance of *both* certificates; (emphasis supplied) (Finding IX, p. 78)

(3) In each proceeding the Commission considered evidence not offered or received therein, and the findings were so commingled in the Commission's report that it is impossible to determine whether or not a finding, with respect to one application, is supported by evidence submitted in the hearing thereon; (Finding X, p. 79)

(4) The Commission failed to find whether or not each applicant was capable of equipping, maintaining, and conducting the proposed operation in the face of competition from the other; (Finding XII, p. 79) and

(5) The Commission failed to find that Consolidated was adequately equipped to establish and maintain the proposed through-line operations under any conditions. (Finding XIII, p. 79)

The court below concluded that appellees had been deprived of a fair hearing, that the order and certificates were erroneous because of the Commission's failure to make essential findings, and should be suspended, and the proceedings remanded to the Commission for further hearings. (80-81) From the judgment entered on February 5, 1945, in accordance with such conclusions, this appeal was taken.

ARGUMENT

Appellees specify 25 separate assignments of error upon which they intend to rely. (87) The assignments

of error may be conveniently considered under five general topics, namely:

1. The commingling of evidence, findings and conclusions as to the separate applications of two applicants and from two independent records into a single report, without the knowledge or consent of the parties.
2. The failure of the Commission to give appropriate notice, conduct hearings, or make suitable findings concerning the need for the institution of two added through line competitive operations between Portland and San Francisco.
3. The failure of the Commission to consider public interest as opposed to the convenience of the two applicants.
4. The refusal of the Commission to grant a rehearing and reconsideration.
5. The lack of suitable findings, or supporting evidence, relating to the ability of Consolidated to perform its proposed service.

In addition, two minor and incidental issues are presented, namely:

1. The propriety of the trial Court's action in striking a belated affirmative defense of laches from the answer of Consolidated; and
2. The contention that the Court below erred in basing its findings that plaintiffs were denied a fair hearing upon a theory neither pleaded nor argued.

Our discussion of the issues will be presented in the foregoing order. The facts pertaining to each will be developed in connection with the discussion relat-

ing thereto.

Appellee's assignment of error No. 4 alleges error in deciding that the findings of the Commission are not supported by substantial evidence. What the District Court actually found was:

> "There is no evidence in the records to support the Commission's finding that the present and future public convenience and necessity require *both* the operations." (Emphasis supplied) (79)

The formal findings of the Court below contain other findings of a like nature, all related however to the question of proof of need for or ability to operate two independent services as distinguished from a single service by one carrier. This subject is fully treated under the topics listed above. Since the purported issue stated in assignment No. 4 has no foundation in the findings of the Court below, we refrain from discussing it.

Before entering upon a discussion of the issues above outlined we present a brief summary outlining the powers which may be exercised by a reviewing Court when orders of the Commission are under attack.

Sec. 205 (g) of the Act (49 USCA, Sec. 305 (g)) provides that final orders of the Commission made under part II of the Act—the part involved here—"shall be subject to the same right of relief in court" as is provided with respect to orders of the Commis-

sion made under part I of the Act.

Jurisdiction to "suspend" orders of the Commission is conferred on the United States District Courts by 28 USCA, Sec. 41 (28). By judicial decision, it is now established that there are several grounds on which the courts may suspend orders of the Commission. Some of these grounds, in general, are:

1. Where the hearing, in the proceeding wherein the order was made, is unfair.

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 91, 57 L. Ed. 431, 33 S. Ct. 185;
United States v. Abilene & S. R. Co., 265 U.S. 274, 289-290; 68 L. Ed. 1016, 44 S. Ct. 565;
Atchison, T. & S. F. R. Co. v. United States, 284 U.S. 248, 262, 76 L. Ed. 273, 52 S. Ct. 146.

See also:

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-54, 80 L. Ed. 1033, 56 S. Ct. 720;
Morgan v. United States, 298 U.S. 468, 480-481, 80 L. Ed. 1288, 56 S. Ct. 906; 304 U.S. 1, 82 L. Ed. 1129; 58 S. Ct. 773;
Anniston Mfg. Co. v. Davis, 301 U.S. 337, 355-357, 81 L. Ed. 1143, 57 S. Ct. 816.

2. Where the order is not supported by "quasi-jurisdictional" (sometimes referred to as "basic" or "essential") findings.

Florida v. United States, 282 U.S. 194, 215, 75 L. Ed. 291, 51 S. Ct. 119;
United States v. Baltimore & O. R. Co., 293 U.S. 454, 465, 79 L. Ed. 587, 55 S. Ct. 268;

United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 510-511, 79 L. Ed. 1023, 55 S. Ct. 462;
Atchison, T. & S. F. R. Co. v. United States, 295 U.S. 193, 201-202, 79 L. Ed. 1382, 55 S. Ct. 748.

See also:

Miller, I.C.C. Law and Procedure, 571-574.

3. Where the findings are not supported by the evidence.

Interstate Commerce Com. v. Louisville & N. R. Co., 227 U.S. 88, 91, 57 L. Ed. 431, 33 S. Ct. 185;
United States v. Abilene & S. R. Co., 265 U.S. 274, 288, 68 L. Ed. 1016, 44 S. Ct. 565.

See also:

Akron, C. & Y. R. Co. v. United States, 261 U.S. 184, 203, 67 L. Ed. 605, 43 S. Ct. 270;
Baltimore & O. R. Co. v. United States, 264 U.S. 258, 265, 68 L. Ed. 667, 44 S. Ct. 565;
Federal Radio Com. v. Nelson Bros. B. & M. Co., 289 U.S. 266, 277, 77 L. Ed. 1166, 53 S. Ct. 627.

I

THE DISTRICT COURT COMMITTED NO ERROR IN HOLDING THAT A FAIR HEARING WAS DENIED BECAUSE THE COMMISSION IMPROPERLY CONSIDERED TWO SEPARATE RECORDS AS THOUGH THE CASES WERE CONSOLIDATED AND THAT THE FINDINGS AND CONCLUSIONS IN THE SEPARATE PROCEED-

INGS ARE SO COMMINGLED IN A SINGLE REPORT AS TO MAKE IT IMPOSSIBLE TO DETERMINE THEREFROM WHICH RECORD GIVES SUPPORT TO THEM—

The views of the Court below concerning the commingling of records in the two separate proceedings are summarized in its opinion in the following language:

> "This opinion and report of Division No. 5 of the Commission uses language which would indicate that the Commission considered these separate records as though the case were a consolidated one. No differentiation is made in the language of the findings as to whether the supporting evidence is drawn from one record or the other and in some instances evidence which appeared only in one record is used to support a general finding as to Consolidated and O.N.C. also. This was made the point of attack by the plaintiffs who contend that they had no notice of this species of approach to the problem." (65)

In the Court's findings of fact the subject is embraced in finding numbered X in these words:

> "The Commission considered the separate records as though the case was a consolidated one. Evidence which appeared only in one record was used by the Commission to support general findings in the Report concerning both Consolidated and O.-N.-C. In each proceeding embraced within the Report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record therein was drawn upon and considered by the Commission. The findings and conclusions in the separate proceedings are so commingled in the single report as to make it im-

possible to determine therefrom which record gives support to them." (79)

We shall attempt to demonstrate the fatal commingling of the record from a consideration of the order itself with a minimum of references to the records in the respective proceedings, it being obvious that any attempt to demonstrate by record references the instances where evidence in only one record was made applicable to both would place an intolerable burden upon both Court and counsel.

For a clearer understanding of the ultimate issue the original physical operations of the intervening appellants must be described.

Consolidated Operations

At the time of filing this application Consolidated was authorized to operate as a common carrier in Washington, Oregon, California, Nevada, Idaho, Montana, North Dakota and Minnesota. However, it was not authorized to operate from Klamath Falls and Medford, Oregon, south to San Francisco. By this application it sought (*inter alia*) to fill this gap. By doing so it proposed service from San Francisco to numerous points in Oregon, Washington, Idaho and Montana, which latter points it already served. In these respects its application differed radically from that of O.N.C. (11, 1540-1541)

O.N.C. Operations

In contrast, at the time of making the instant application, O.N.C. was authorized to operate from San Francisco to Medford and Klamath Falls Oregon, and Elko, Nevada. By this application it sought to extend its operation northward to Portland, Oregon, and Vancouver, Washington, via both Medford and Klamath Falls. (12)

Similarity and Differences Between Applications

Insofar as the operations pertained to service between San Francisco and Portland, generally speaking, the proposals are similar. In all other important respects the applications differ radically. This fact bears importantly on the position of appellees. Consolidated's extensive operations permitted it to propose some apparently radical service innovations which are high-lighted and emphasized in the Commission's decision. By comparison, the proposals of O. N.C. were modest indeed and lent themselves less readily to use as justification of the attacked order. On the other hand, O.N.C. had the support of a large majority of the shippers who had obviously developed a personal loyalty to and preference for its service.

Reasons for Interveners' Applications

The Commission's Order recites (12):

"In order better to understand the questions presented herein, it is necessary to review briefly certain events leading to the filing of the instant applications. In 1938 Consolidated's president sent out letters to its connecting carriers, including O.N.C., suggesting to them the formation of an association for the purpose of eliminating many of the difficulties encountered in the interchanging of freight. Thereafter an organization named 'Freighways', composed of motor carriers, was formed and has been functioning since January 1940. The purpose of the organization is said to be to aid its member trucklines in cooperating in the matter of schedules and advertising, to provide them with joint solicitation, and generally to improve the handling of traffic. O.N.C.'s president, having formed the opinion that no action on the part of Freightways could improve the then existing services, declined the invitation to become a member of the organization. About November 1939, O.N.C.'s president was advised by the president of Consolidated that he had had plenty of time to decide whether or not to join the organization, and that, if he was not willing to do so, Consolidated intended to file an application for rights to operate into California. On January 2, 1940, Consolidated filed an application to extend its operations southward from Medford, Klamath Falls, and Lakeview to San Francisco Bay points over the routes operated by O.N.C. While the failure of O.N.C to join Freightways influenced Consolidated in the filing of this application, its president could not say that if O.N.C. had joined Freightways, its application to extend operations to San Francisco would not have been filed. On January 26, 1940, O.N.C. filed an application to extend its operations northward

> from Medford and Klamath Falls to Portland over the routes operated by Consolidated. *O.N.C. would not have filed its application if Consolidated had not.*" (Emphasis added) (13).

These facts are undisputed, as stated, but are taken indiscriminately from *both records* without reference to either.

Both interveners were so *unsure* of their position in this proceeding that they sought to accomplish the same result by purchasing or controlling connecting carriers (and did accomplish the result before the attacked order was issued) (13-14), although the Commission *at that time* refused to sanction either effort.

Commingling of the Records

We desire first to direct the court's attention to the following language of the Commission's order:

> "*For reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley Route.*" (Emphasis added) (39).

This conclusion, undoubtedly reached without reference to the proof offered by either applicant, but as a matter of administrative expediency explains the order and the error of the Commission.

At page 38 of the printed record the Order states correctly the law governing disposition of *each* of these matters:

> "Certainly any motor carrier may file an application under section 207 (a) of the act and the issues would be, as in these proceedings, whether the proposed service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by an applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

At page 17, the Order summarizes the Commission's concept of the bases upon which *both* interveners' cases are rested:

> "In finally deciding the questions presented herein, applicants' cases rest on (1) their proposed speed-up of service, (2) their use of mechanically-refrigerated equipment, (3) their service to intermediate points, (4) their proposed single-line service as against joint-line service, and (5) in respect of Consolidated, its proposed through operations between San Francisco and points in eastern Oregon and Washington, between the Coos Bay area and San Francisco over the Coast route, and to and from Lakeview."

These points we will discuss *seriatim*, disregarding all analysis of testimony from the partisan witnesses of interveners or plaintiffs which consists mostly of proposals and argumentative matter with respect thereto.

(1) *Their Proposed Speed-Up of Service.*

This proposal of *either or both* interveners was hotly contested as to its practicability, but the Commis-

sion concluded *"that applicants should be given the benefit of whatever doubts may exist as to their ability to maintain the proposed time schedules."* (Emphasis added) (29).

This, of course, was *Number One* of the deciding factors in whether applicants, or *either of them*, proved its case. The burden of proof was on the applicants. Whether in either case this factor served the public interest, and proved its requirement for the convenience and necessity of the public, depended upon the evidence adduced by either or each of applicants. But, the Order recites:

> "Approximately 120 shipper witnesses were called *by one or the other of the applicants*, although some few testified in behalf of both applicants. * * * (17)
>
> "Applicants' (sic!) shipper witnesses, *as a whole*, are engaged in shipping or receiving general commodities at numerous points in California, Oregon and Washington, and at some few points in Idaho. *But the value of most of the shipper testimony is difficult to appraise.*" (Emphasis added) (17).

Vigorous comment upon the underscored portion suggests itself, but it would be superfluous.

At page 28 the Order states:

> "*Proposed speed-up of service.* The proposed faster service has been discussed hereinbefore in some detail. Briefly, *the proposal is to save as much as 24 hours in service between San Francisco and certain points.*" (Emphasis added).

To which record does this refer? To what points was a 24-hour faster service proposed? Certainly not by both applicants. O.N.C. was operating between San Francisco and Portland, points only 28 to 30 hours apart on the basis of present service. It proposed to serve points beyond Portland by interchange involving as much delay as now experienced (16).

At page 29 the Commission Order reads:

> "Numerous public witnesses expressed a need for a service that would be time-saving. Some of them asserted that it would increase their business."

In which record? With regard to what time-saving? And between what points?

On page 39 under its own heading of "Discussion and Conclusion", the Commission concludes:

> "There is no doubt but that a number of shippers desire such proposed services." (39)

Which shippers? Testifying in support of what proposed service?

> "The proposed service will enable shippers to obtain goods more rapidly, resulting in an increase in their businesses." (39)

Which shippers? What proposed service? In support of which application did they testify?

> "Some of the shippers estimated an increase in business amounting to several thousand dollars." (39)

Which shippers? In support of which applicant did they testify? Whose proposal would result in the saving?

All of this, of course, refers to "approximately 120 shipper witnesses * * * called by one or the other of the applicants." The proposed services are those of either or both of applicants indiscriminately.

The proposed speed-up of service of either or both of the applicants is significant only as proof, in whole or in part, that "the proposed service will serve a useful public purpose, responsive to a public demand or need." This proof could be adduced only from witnesses who use and need motor transportation services, or, as they are referred to in the Order, "Shipper witnesses." Since the shipper witnesses offered by each of the applicants separately were testifying with respect to the wholly different proposals of the respective applicants, the indiscriminate reference to their testimony in support of both applications is wholly unwarranted. It is quite conceivable that the witnesses adduced by one of the applicants might have testified to sufficient facts to indicate that the proposed speed-up of the particular service offered by the particular applicant was responsive to a public demand and need, while in the other instance the testimony might have been wholly insufficient.

It is obvious that the preconceived notion of the Commission that it must either grant or deny both

applications caused it to consider the testimony of all the shipper witnesses as constituting evidence in both cases of the existence of such public need.

On the other hand, it is quite conceivable that in each case the so-called shipper witnesses might have testified to sufficient facts to justify a finding that there was a public demand and need for *one* additional through service but not for *two* additional through services. This, of course, would require the Commission to make a choice between Consolidated and O.N.C., which their own stated Conclusion indicates they had no intention or desire to do.

In that event, the only method available to the Commission to avoid the necessity of making a choice was to place together as though all contained in both records the testimony of the shipper witnesses adduced in each case. But, whatever the motive, the practice is prohibited, and is fatal.

(2) *Their Use of Mechanically-Refrigerated Equipment.*

The studied practice of the Commission, as well demonstrated under the previous heading, is carried out further in support of the second point upon which the Commission found these applications rested.

At page 29 the Commisison Order recites:

> "*Mechanical refrigeration.* The production of frozen fruits and vegetables in Oregon and Wash-

ington increased from almost 39,000,000 pounds in 1933 to over 79,000,000 pounds in 1939. This traffic requires refrigeration and normally moves southbound. Both applicants look to this traffic to help balance the proposed operations, as, at the time of hearing, the northbound movement of traffic was much heavier than that southbound although the volume of southbound traffic was increasing.

"Certain of the shippers prefer mechanical refrigeration because it can be controlled and is more satisfactory; some few complain that the equipment of certain protestants is not properly refrigerated; and at least one shipper has had to abandon attempts to make small shipments requiring refrigeration."

The statistics quoted in the first paragraph are taken from Exhibit 4 in the Consolidated record and do not appear in the other record. In support of which application the witnesses testified that they preferred mechanical refrigeration we are unable to determine.

At page 39, the Commission concludes:

"Each applicant also operates units equipped with mechanical refrigeration, which service *certain of the shippers* desire for the proper transportation of their shipments." (Emphasis added).

In whose behalf did "certain of the shippers testify?" And whose service do they desire?

(3) *Their service to Intermediate Points.*

Most of the evidence referred to under this heading is a consideration of the purported lack of serv-

ice on the part of protestants to intermediate points (30). But even on this point, when referring to the testimony adduced by the applicants, the Commission has again commingled the record.

> "Some of them (shipper witnesses) have used the services of existing carriers and have not found them satisfactory, principally because of improper refrigeration or lack of service to intermediate points. The latter complaint also pertains to the fact that protestants come through the intermediate points with full loads and shipments have to be held." (39)

No effort is made to indicate in support of which application witnesses so testified, nor as to which intermediate points service is proposed or is now not being rendered, nor which of the proposals intends to afford service to such intermediate points.

(4) *Their proposed Single Line Service as Against Joint Line Service.*

Pages 31 to 34 are devoted to a discussion of the difficulties which Consolidated and O.N.C. experience in their interchange arrangement. Reference is made to the testimony of officers of both companies without reference to the source of their testimony. It is considered together to arrive at the conclusion that the then existing connecting service was fraught with so many difficulties that it could not be continued, and that *two* through services should be substituted in lieu thereof. There is no indication of how much of

a showing each of the parties made upon its own record and whether the evidence in each record without consideration of the evidence in the other record would have supported such a conclusion. In this connection it will be recalled that on page 13 the Commission found that "O.N.C. would not have filed its application if Consolidated had not." Obviously, O.N.C. thought it could and would have been satisfied to continue the joint service if Consolidated had been so inclined. In addition, the Order shows that one proposes to continue interchanging at Portland, Oregon, for points north and east thereof (16). Thus it becomes obvious that it was necessary for the Commission in order to justify its desired conclusion, to add together all of the testimony on this point.

Ultimate Conclusion

At page 40 the Commission Order recites:

> "In view of the foregoing, we are of the opinion that public convenience and necessity require the operations set forth in our findings herein."

The "foregoing", of course, refers to all of the commingled analysis of evidence and the unidentified conclusions drawn therefrom, which we have in detail pointed out. There is no theory of law or principle of justice which could permit the Commission to draw this conclusion, as they have drawn it, by throwing together the mass of evidence adduced in each of

these causes. Under these circumstances no presumption should apply. Cf. *United States v. Chemical Foundation*, 272 U.S. 1, 14.

It may here be urged by appellants, as was argued in the District Court, that the commingling of the records made no difference so long as each record contained substantial evidence to support the erroneous findings. But, who is to determine that each of the records considered separately contains substantial evidence to support the findings? The Commission has not so determined. It quite obviously had no intention of doing so. It's *a priori* reasoning that both must be granted or denied almost necessarily prevented it from making such determination.

In any event, the law does not permit such an order to stand.

> "The fact that the final order of the Commission might be justified on the merits does not obviate the requirements of a fair trial."

Kline v. United States, 41 F. Supp. 577.

U. S. v. Abilene & So. Ry. Co., 265 U.S. 274, 68 L. Ed. 1016, 44 S. Ct. 565, involved an order of the Interstate Commerce Commission fixing certain divisions of joint rates of rail lines. It was conceded that the decision rested in part upon data taken from the annual reports of the carriers filed with the Commission, which reports had not been officially introduced in evidence, although the parties were given notice

in an examiner's report that some consideration would be given to such data. The court in its opinion holding the order to be void said:

> "Nothing can be treated as evidence which is not introduced as such,"

citing *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88. 91, 93, 57 L. Ed. 431, 33 S. Ct. 185, and *Chicago Junction Case*, 264 U.S. 258. The court then said, in part:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untruthworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the findings made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.
>
> "* * * * * The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

See, also

Morgan v. United States, 298 U.S. 468;
Ohio Bell Tel. Co. v. Pub. U. Comm., 301 U.S. 292.

In a recent decision, *Jersey City v. United States*, 54 F. Supp. Ad. Shts. 315, the court said, bearing upon this point:

> "But the more liberal the practice in admitting testimony, the more imperative the obliga-

tion to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown, but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. Co.*, 226 U.S. 14, 33 S. Ct. 5, 57 L. Ed. 104."

In concluding discussion on this point we wish to draw the court's attention to the fact that the hearing in the O.N.C. case was held before Joint Board No. 5, and in the Consolidated case before Joint Board No. 11 (10)—two separate tribunals constituted by the Commission under the provisions of the Motor Carrier Act. The records in each case were kept completely separate, except insofar as the testimony of a few witnesses were by stipulation made to appear in both records. However, in cases where stipulations were thus made they were made at the time that the testimony of the witness was introduced and all parties were apprised of and agreed to the stipulation. The making of these stipulations further demonstrates the care with which the tribunals holding the

hearings and counsel themselves kept the records separated.

The findings of the specially constituted District Court condemning the improper commingling of the evidence, findings and conclusions from these two records, and holding that such procedure denied to these appellees a fair hearing must accordingly be sustained.

II

THE DISTRICT COURT PROPERLY FOUND THAT APPELLEES WERE DEPRIVED OF A FAIR TRIAL BECAUSE THE COMMISSION FAILED TO GIVE APPROPRIATE NOTICE, CONDUCT HEARINGS, OR MAKE SUITABLE FINDINGS CONCERNING THE NEED FOR THE INSTITUTION OF TWO ADDED THROUGH LINE COMPETITIVE OPERATIONS BETWEEN PORTLAND AND SAN FRANCISCO.

The formal findings of the Court below contain the following findings of fact directed to this issue:

> "IX The whole basis of the original proceedings before the Joint Boards was the question of whether any through-line operation between San Francisco and Portland should be allowed and, if so, which one of the two separate applications. No notice was given to plaintiffs, or to other protestants, or to the general public, or to the witnesses who testified before the Joint Boards to the contrary. The records upon which the Commission's order and the Report of Division 5 are based were not made upon the basis that two

through-line operations might be allowed. There was no suggestion to anyone that such a result was possible until the Commission's order was served upon the interested parties. (78)

"The Commission's order and the certificates of Public Convenience and Necessity issued to Consolidated and O-N-C aforesaid authorize both Consolidated and O-N-C to engage in competition with the existing lawful operations of plaintiffs between numerous points and places." (79)

* * * * * * *

"XII The Commission failed to find, and there was no evidence in either record to support such a finding, that each applicant was separately capable of equipping, maintaining, and conducting the proposed operation in the face of competition from the other." (79)

* * * * * * *

"XV No evidence was offered or submitted by any party nor requested or taken by the Commission or by said Joint Boards as to the rights and duties of any plaintiff or the effect upon the rights, duties, or property of any plaintiff of the institution of two through-line competitive operations between San Francisco and Portland. And no plaintiff had a reasonable or fair opportunity to anticipate the necessity for the submittal of evidence as to such effect upon plaintiffs' rights, duties, and property." (80)

"XVI Many witnesses representing the shipping and receiving public appeared at said hearings and testified on behalf of Consolidated, O-N-C and the protestants (including plaintiffs) and on behalf of the public generally. Neither such witnesses nor the general public had any notice prior to the said hearings, or at any time before the Commission's order was issued, that it was possible or probable that two through-line operations in competition with each other and with

the plaintiffs and other existing transportation agencies might be authorized by the Commission as the result of such proceedings." (80)

"XVII No opportunity was given to plaintiffs to maintain their rights or to present appropriate protests and defenses to the institution of two competing through-line operations between San Francisco and Portland." (80)

It was the District Court's conclusion of law: "That plaintiffs (appellees) were deprived of a fair trial before the Commission". (80)

The recital of facts under the previous topic and a brief analysis of the findings of the Commission are sufficient to sustain the findings and conclusions of the court below. Here, as in the preceding analysis, the Commission's faulty conclusion is explained by its stated intention and desire, apparently for reasons of expediency, to grant or deny both applications.

Not only is such an approach to the issues of the two proceedings inconsistent with the principles of the Federal Motor Carrier Act, which predicates the granting of new service upon an ascertained public need, but its projection for the first time in these proceedings in the decision of Division 5, without notice to the interested parties, coupled with the denial of the petiton for rehearing, foreclosed any opportunity for appellees to meet the issue either by the introduction of evidence or otherwise.

Section 205 (e) of the Act requires notice and op-

portunity for participation in the hearing to be "afforded to all interested parties". More than a perfunctory acquiescence by the Commission in the appearance of protestants is required. As said in *Morgan v. United States*, 304 U.S. 1, 18-19, 82 L. Ed. 1129, 58 S. Ct. 773:

> "* * * The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Thus, in the instant case, a reasonable opportunity to know of the contention that *both* applications should be granted was required to be given appellees. No such opportunity was given appellees. They were not advised of any such contention prior to the issuance of the Commission's report. No evidence was adduced in support of such a contention, and no argument to that effect was made in any of the briefs filed.

Applications Filed Allege No Public Need For the Institution of Two Added Through-Line Competitive Operations and No Hearing Was Had on the Issue

Each of the applications in the respective proceedings was in conventional form and presented an issue as to whether any additional through-line operations should be approved between Portland and San Francisco in competition with service of existing authorized carriers. Each applicant urged a superior right to the favor of the Commission, as opposed to the other applicant, and endeavored to prove, not that there was room or need for two added through carriers nor that there was need for any added service, but merely that a single through-line service was preferable to its own joint line service in conection with the other applicant.

This fact is ably demonstrated by a glance at the testimony of the managing officers of the two applicant companies. The testimony of J. A. Gritsch, president and managing head of O.N.C., clearly discloses that the application of his company was filed purely as a counter-proposal to the previous application of Consolidated. The motivating reason for the application was not a claim of public need for added service but the filing of a similar application by Consolidated. His testimony is devoid of any suggestion that public convenience and necessity require the granting of both applications.

The basis and substance of the testimony of this witness is characterized by the following excerpts from the record. After considerable discussion concerning a question asked by Chairman Terril, Chairman Terril inquired and the witness answered as follows:

> "Now, what I am asking you now is that if you could find either Consolidated Freightways or some other carrier who serves between the Northwest area including Portland to Medford who was willing to enter into an arrangement permitting a unified control of the whole of the operation, whether you would be willing to enter into such an arrangement with that carrier who was of that mind?
>
> The Witness: I would say, 'yes, I would', but I would sooner have the through operation myself." (918)

Thereafter Board Member Brown inquired and the witness responded as follows:

> "Mr. Gritsch, would you have filed your application if Consolidated Freightways had not filed its?
>
> The Witness: No, I wouldn't have." (918)

The testimony of A. H. Gritsch, secretary of O.N.C., who presented statistical exhibits of tonnage and revenue for this applicant, is also devoid of any facts supporting the granting of two through routes. Exhbits 7, 8 and 9 from the O.N.C. record (104, 1436, 1437, 1438 herein), offered through this witness, (parts of Exhibit 2 herein) which typify the presentation of this applicant, reflect the revenue which O.N.C. would have

earned if it had hauled through to Portland *all* of the freight then interchanged between it and Consolidated. Only in response to questions on cross-examination was any consideration given to the possibility that a division of traffic might result in the event the applcation of Consolidated should be granted and the witness was compelled to concede that if O.N.C. should retain all of the northbound traffic and Consolidated all of the southbound traffic Consolidated would be in a hopeless position. (824) The effect of such a situation upon appellees, or the question whether both applicants might profitably operate separate through routes in competition with each other and with existing carriers, received no consideration.

While Leland James, president of Consolidated, in the course of his testimony apparently conceded that in the event the application of his company should be granted he anticipated the probable granting of the application of O.N.C., his approach to the issues assumed that only the interests of those two carriers and their customers need be considered. He freely admitted that Consolidated had made no investigation to determine what truck lines were operating over the routes involved and considered such an investigation unnecessary. (104, 1465) His testimony was directed almost wholly to the presentation to the alleged advantages of a single line through-service over the then existing joint line service. In the case of

Consolidated, as in the case of O.N.C., it was not any claimed public need for added through-line carriers which prompted the filing of its application but its own private interests, the immediate cause being the refusal of O.N.C. to join the Freightways organization. (104, 2091)

An examination of the testimony of shipper witnesses likewise confirms the finding of the District Court that the Commission failed to conduct hearings concerning the need for two added through-line carriers. Indeed, it is no exaggeration to say that the shipper witness testimony on behalf of the respective applicants, even though the two records be combined, is inadequate to support the granting of a single added through-line service. Perusal of this evidence makes obvious the fact that witnesses for Consolidated had been told that a direct through service was proposed by that company which would speed up deliveries, and that O.N.C. witnesses had been told that O.N.C. proposed such a service. The substance of their testimony was that if anybody could give better or faster service than was available they were in favor of it but most of them confessed ignorance concerning the character of service already available, thereby disclaiming knowledge whether any added service was required. Most of these witnesses merely expressed the opinion that through service on the part of the carrier whom they sponsored would have advantages over a joint service. Twelve of the 35 witnesses testi-

fying for Consolidated in support of the Valley route had no knowledge of the existing joint trailer service operated by the two applicants by interchange of equipment, and 13 admitted ignorance concerning all or most of the existing single line through services of other carriers. Eight of them admitted they had never used the through service of other carriers. Of the sixty shipper witnesses called by O.N.C. in support of its proposed through Valley route, 43 confessed ignorance concerning the single line through service of other carriers, and 44 of them admitted they had not used the available single line service.

The partisan character of this applicant shipper testimony and its inapplicability to the issues of the other application or as support for the granting of two additional through routes is strikingly revealed by the fact that of the sixty witnesses testifying for O.N.C. the testimony of only four such witnesses from the O.N.C. record was introduced in the Consolidated record in support of the Consolidated application.* The conclusion is inescapable that it was the considered judgment of counsel for Consolidated that the testimony of the other 56 shipper witnesses testifying on behalf of O.N.C. contained nothing which would support the Consolidated application.

So far as the issues here discussed are concerned, the highly significant fact is that none of the wit-

* Toye, 473-484, Gregg, 603-617, Brannon, 745-762 and Wilsey, 774-786.)

nesses in either case expressed the slightest need for two added through services. Indeed it is strikingly evident that each applicant concealed from its shipper witnesses the fact that the other applicant was seeking similar authority. With possibly one or two exceptions, those who were asked on cross-examination whether they were aware of an application by the applicant in the other case answered in the negative. Therefore, whatever weight is attributed to the expressions of these shipper witnesses concerning the need for the grant of the single through line service which they support, none of it lends any support for the authorization of two independent and competitive services. The most that may be said for it is that it expressed the opinion of each witness that a through line service was preferable to joint line service and that the particular witness favored the granting of the right to the particular carrier which he sponsored, *if the Commisison should find existing service to be inadequate.*

From this analysis, which an examination of the record will ably confirm, it is clear that the need for two added competitive through line operations between Portland and San Francisco was not the subject of either hearing, nor was any hearing had thereon.

The Commission Failed to Make Suitable Findings Concerning the Need for Two Added Through-Line Competitive Operations

As the District Court has pointed out in its opinion, the Commission made no findings whatever concerning any public need for the added service of two through-line competitive operations. As to each applicant it merely followed the language of the statute and expressed its conclusion with the statement that as to each applicant "the public convenience and necessity require operation by applicant".

The Commission's only expressed conclusions upon the merits of the combined cases are embraced in the topic entitled "Discussions and Conclusions" beginning on Sheet 22 of its report. (37) We briefly review this section of the report, emphasizing all determinations of fact made by the Commission bearing upon the Valley route. An examination of this section of the report discloses:

1. The first paragraph outlines an issue between the applicants and protestants as to the reasons prompting the filing of the applications. (37)

2. The second paragraph concludes it is unnecessary to decide the issue stated in the first paragraph and states concisely and accurately the issues which are determinative of the question of public convenience and necessity in cases of this type, namely:

(a) Whether the proposed service will service a useful public purpose, responsive to a public demand or need;

(b) Whether this purpose can and will be served as well by existing carriers; and

(c) Whether it can be served by an applicant with the new operation or service proposed without injuring or impairing the operations of existing carriers contrary to the public interest." (38)

Although the report does not so indicate, the language above quoted is in fact the language of this Court in *Texas & N. O. R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, and will be found at page 479 of the report.

3. The third paragraph discusses service to off-route points and states there is no evidence as to a need for the service of either applicant to any off-route point except for the service of O.N.C. at the off-route points of Camas, Vancouver, Washougal and Glendale, and of Consolidated at certain off-route points which it now is authorized to service. (38)

4. The fourth paragraph discusses the Coast route portion of the applications, not here in issue, and states that these portions of the applications will be denied. (38)

5. The fifth paragraph recites the fact that *Consolidated and O.N.C. transport the bulk of the traf-*

fic between San Francisco and Portland and concludes:

> "For reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley route." (39)

6. The sixth paragraph states that each of the two applicants offer, over the Valley route, an expedited through single line service as well as service to or from all intermediate points. Here follows the first statement of fact or conclusion bearing directly upon the issue of public convenience and necessity, the details of which issue are hereinbefore set out. The Commission states:

> *"There is no doubt but that a number of shippers desire such proposed service. Each applicant also operates units equipped with mechanical refrigeration, which service certain of the shippers desire for the proper transportation of their shipments. The proposed service will enable shippers to obtain goods more rapidly, resulting in an increase of their business."* (39)

The remainder of the paragraph contains brief recitals of evidence, including among other things a statement that some shippers had not used available single line service, others had used it and found it satisfactory, others were not familiar with the through service available, and others had used existing service and found it unsatisfactory.

7. The seventh paragraph recites an issue concerning whether the applicants, by through billing and

exchange of power equipment as well as trailers, could render the service proposed. The Commission decides part of the issue by stating:

> *"Through trailers represent no saving in time because they have to be held until power equipment arrives."* (39)

No conclusion is expressed upon the question whether arrangements for through billing and interchange of power equipment would correct the difficulties.

8. The eighth paragraph outlines the contention of protestants that the granting of authority, especially as to southbound traffic, would further divide the available traffic and impair their ability to render adequate service. The Commission found

> *"But the traffic northbound as well as southbound is increasing,* and from the facts heretofore discussed in respect of the increase in business enjoyed by the motor carrier protestants, it would be difficult to conclude that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair operations of existing carriers as to be contrary to the public interest." (40)

Then, discussing the proposed service of Consolidated via Klamath Falls to eastern Oregon and eastern Washington points, it said:

> "Certainly there is no evidence of any impairment of existing service if Consolidated is authorized to extend its route southward from Klamath Falls, for there is now no service through or joint, between points in central and eastern Oregon and Washington over the proposed routes."

9. The ninth paragraph (40) states:

> "Of the motor carrier protestants there is only one—Pierce—which *is authorized to transport general commodities to and from all intermediate points along the Valley route*":

that the Pierce operation was instituted on a daily basis but a few weeks prior to the hearings; that

> "*Shipper witnesses generally were unfamiliar with the fact that Pierce's operation was daily. There are, of course, certain other motor carriers operating over this route but their authority is either* (1) *restricted in such a way as to preclude a finding that their service is adequate especially as to intermediate points, or* (2) *the record definitely establishes their service to intermediate points, and in some instances to and from San Francisco, is at best neglible.*"

A conclusion is then expressed that

> "In view of the foregoing we are of the opinion that public convenience and necessity require the operations set forth in our findings herein."

10. Paragraph ten deals with the subject of fitness. The Commission finds: (40)

> "*There is no doubt as to O.N.C.'s fitness, financially or otherwise, to conduct the operations herein authorized* although protestants question Consolidated's financial ability to conduct the proposed operation."

After a brief discussion of the contentions of protestants and applicants the Commission finds:

> *"The elimination of the cost of transfer at Medford would save approximately* $1,500.00 *or* $1,600.00 *a month."*

Then, without deciding the issue as to Consolidated's financial ability to conduct the operation, and without deciding whether either of the operations would be financially profitable, the Commission concluded its consideration of the subject by stating:

> "we are of the opinion that we should give applicant the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein." (40)

Summarizing the factual conclusions actually expressed by the Commission, treating the two records as one, they are:

1. Applicants transport the bulk of the traffic between Portland and San Francisco.
2. A number of shippers desire the proposed single line service, which would enable them to obtain goods more rapidly.
3. Traffic is increasing.
4. The Pierce line handles general commodities between all points and provides daily service.
5. Other carriers operate over the route whose operations are restricted or whose service to intermediate points is negligible.
6. There is no doubt as to O.N.C.'s fitness, financially or otherwise, to conduct the operation.

It must be obvious that these findings are not only entirely insufficient to support a grant of authority for two competing lines but inadequate to support

even a single added service. None of the essential requirements have been fully met. While there is a finding that a number of shippers desire "such proposed service" there is no finding as to the proposed service they desire or which proposed service will enable shippers to obtain goods more rapidly. Neither is there any finding that either proposed service will actually serve a useful purpose.

Next, there is no finding whatever whether or not this useful puprose, if any there be, will be served as well by existing carriers. It is particularly notable that the Commission finds that the Pierce line handles all commodities, serves all points and renders daily service, exactly the type and character of service for which shippers expressed a desire, but the Commission does not even suggest that the Pierce line is in any respect unable to fully meet the public need for this through service. The subject is dismissed with the comment that this service was only recently established and that shippers were generally unfamiliar with it. This lack of jurisdictional findings is particularly significant in the light of the decision in MC 1823, (sub. No. 4) rendered Sept. 26, 1942, wherein the facilities of existing carriers are fully discussed and the finding made that "all of the above described motor carriers are in a position to handle additional traffic and are able to add more equipment if the traffic requires it." (11, 2317)

There is no finding whatever that the proposed service could be afforded by either applicant, and certainly not by both, without injuring or impairing the operations of existing carriers contrary to the public interest. It is to be noted that the Commission evaded this issue by saying that 'it would be difficult to conclude" that impairment would exist.

Concerning the subject of fitness, the Commission made a finding as to O.N.C. only. It made none as to Consolidated and it made no finding even as to O.N. C. which gives any consideration to its ability to conduct the proposed operation in competition with Consolidated as well as existing carriers. In this instance also the Commission evades its responsibility to find the facts by giving the applicants the "*benefit of any doubts.*" (40)

A general statement or conclusion in the language of the statute is insufficient to sustain an order of the Commission, unless supported by basic or essential findings of fact, expressed with such precision and certainty as to leave no doubt that the correct rule of law has been applied.

State of Florida et al. vs. United States of America, 282 U.S. 194, decided January 5, 1931, rested entirely upon the sufficiency or insufficiency of the finding of the Commission in a proceeding involving log rates in the State of Florida. Certain intrastate rates prescribed by the Florida Commission were at-

tempted to be set aside and annulled by the Commission upon the ground of undue preference and advantage to interstate shippers within Florida and undue prejudice to shippers or interstate traffic, and in unjust discrimination of interstate commerce.

The question before the court was whether an ultimate finding embracing the language of the statute, in the absence of supporting findings of fact, was sufficient to sustain the order. This Court in an opinion by Mr. Chief Justice Hughes, determined that such a limited finding was not sufficient and the order was set aside. The opinion of the Court discloses that the Commission made extensive findings as to interstate and intrastate rates, including a finding of unjust discrimination against interstate commerce, but such conclusion of unjust discrimination was not supported by findings of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, upon the income of the carrier, which would justify that conclusion. At page 213 of its opinion the Court said:

> "In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result 'in unjust discrimination against interstate commerce.' This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a statewide

order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question.

"The Commission made no findings as to the revenue which had been derived by the carrier from the traffic (215) in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, S. L. & W. R. Co. v. United States*, decided November 24, 1930, 282 U.S. 74, ante, 221, 51 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order."

United States v. Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, 294 U.S. 499, decided March 4, 1945, involved the efforts of a railroad company to establish certain new rates on coal. After investigation the Commission made extensive findings to the effect that the proposed rates would be unreasonable and in violation of a section of the Act denouncing unreasonable charges; that they would lead to disruption of the rate structure and interfere with the ability of carriers serving certain areas to provide the adequate and efficient transportation service contemplated by the Act. While the ultimate conclusions of unreasonableness were fully stated by

the Commission, the Court held that its analysis of the facts of the case failed to disclose that the ultimate finding was justified. Among other things the Court said:

> "At the very least the findings should inform us, if only approximately of the extent of the expected loss; they should make it clear whether the impairment of revenues will be substantial or trivial, for only thus can the impairment be related to capacity for service. *Cf. Florida v. U. S.*, 292 U.S. 1, 9. Nothing of the kind is shown. * * *."

After discussing at length the Court's view as to possible conclusions to be drawn from the factual discussion contained in the Commission's report, the Court concluded its opinions with the following expression:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazel and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. R. Co. v. U. S.*, 282

U.S. 74, 86; *Florida v. U. S.*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

United States of America v. Carolina Freight Carrier Corporation, 315 U.S. 475, decided March 2, 1942, involves a decision of the Commission under the Federal Motor Carrier Act granting in part an application of a carrier for operating rights under the so-called "grandfather" clause. The Commission authorized the issue of a certificate but cut down the geographical area, allowed the applicant to haul only certain specified commodities and did not permit it to haul all of those specified commodities between all of the points in the authorized territory.

The District Court held that such restrictions were not authorized by statute. Upon review this Court, in an opinion by Mr. Justice Douglas, followed the rule of *Florida v. United States*, 282 U.S. 194, and held that the findings of the Commission were not sufficient to support the order. The Court said:

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida v. United States*, 282 U.S. 194 the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the

Commission's order.' And see *United States v. Baltimore & O. R. Co.*, 293 U.S. 454; *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 409. Congress has prescribed statutory standards pursuant to which those rightst are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills v. Administrator of Wage & Hour Dirision*, 312 U.S. 126. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. That is why we cannot say that the Commission would be justfiied in placing the same restrictions on the certificate in this case had a correct construction of the Act been taken."

Howard Hall Co. Inc. v. United States, 315 U.S. 495, decided March 2, 1942, involves another proceed-

ing under the Federal Motor Carrier Act. The issue involved was similar to that in the Carolina Freight Carriers, Inc. case. The Commission had made extensive findings relating to the issues, but, as in the Carolina case, it had not stated its views or conclusions with sufficient clarity to enable the Court to be certain that the correct rule of law had been applied. In reversing the lower court and in setting aside the order of the Commission, this Court used the following language:

> "We take a different view as respects the limitation on commodities which the Commission imposed in case of shipments between specified points. We do not say that that limitation was unjustified. We merely hold that in this case, as in *United States v. Carolina Freight Carriers Corp.* supra, the basic or essential findings to support the part of the order are lacking. * * *"

The Court concluded, as it did in the Carolina case, and as did the District Court in the cause here under review, that the case should be remanded to the Commission "so that the basic or essential findings * * * may be made."

Eastern-Central Motor Carriers Ass'n. et al v. United States, 321 U.S. 194, decided February 7, 1944, is a decision reversing a rate making order of the Interstate Commerce Commission, and the decision of the District Court sustaining it, on the ground of insufficient findings. It appeared from the report of the Commission that it had been controlled in large part

by considerations of operating costs, its report being silent or indefinite on questions of competion between carriers and other matters commonly considered in rate making proceedings. The court significantly said:

> "Upon a matter of such consequence and complexity, our function in review cannot be performed without further foundation than has been made.
>
> "We do not mean by this to imply that the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record. We do not undertake to determine what result the Commission should reach. But we cannot say the one at which it has arrived has the sanction of law without further basis than we now have. This in itself requires reversal.
>
> * * * * *
>
> "In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does. Cf. *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 488, 489. Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours."

City of Yonkers v. United States, 320 U.S. 685, decided January 3, 1944, was an appeal from a District Court of three judges declining to set aside an order of the Interstate Commerce Commission granting authority to abandon a certain line of inter-urban railroad. The jurisdiction of the Commission depended upon whether or not the operations of the inter-urban line were purely local or a part of a system of some interstate carrier. The District Court sustained the order of the Commission, whereas this Court reversed the decision and set aside the order.

In this case this Court has apparently extended its rule concerning the necessity of findings by the Commission somewhat beyond the scope embraced in previous decisions. On the issues of this case the jurisdiction of the Commission was not exclusive, in that jurisdiction of the Court might have been invoked to enjoin violations of the statute involved without a previous administrative determination by the Commission. It was further recognized that the failure of the Commission to make a finding on the jurisdictional question did not preclude a reviewing court from making that determination initially.

In the face of this situation, this Court nevertheless held the order invalid for lack of sufficient findings, saying:

> "But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination

without the basic jurisdictional findings first having been made by the Commission."

* * * * *

"Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (*Illinois Commerce Commission v. Thomson*, 318 U.S. 675, 87 L. Ed. 1075, 63 S. Ct. 834) as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be sufeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

"We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of 1 (22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

"This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert de-

terminations which are conditions precedent to its authority to act.

"We intimate no opinion on the merits of the controversy. For in absence of the requisite jurisdictional findings we think the order of the Commission should have been set aside."

It is pertinent to observe that the language of Section 207 of the Motor Carrier Act was taken verbatim from state statutes in existence at the time of the adoption of the Act, such language being adopted in the light of previous court interpretation of the term "public convenience and necessity". (See explanation of Senator Wheeler, Congressional Record, Vol. 79, pt. 5, p. 5653, 74th Cong. First Session)

The state courts have universally recognized the necessity for findings that there was no existing service in the area applied for or that such service was inadequate or that existing carriers are not furnishing or could not satisfactorily furnish the service required. (Note. 67 A.L.R. p. 957)

Inland Motor Freight, et al. v. U. S., 60 F. Supp. 520, 524.

The inadequacy of the findings of the Commission in the case at bar is demonstrated by its own interpretation of the statutory requirements in other cases, including *Dwyer and Anderson*, 11 M.C.C. 749, where the Commission said:

"Aside from evidence of a willingness and ability to engage in the operation of motor ve-

hicles as a common carrier, under the provisions of the Act, there must be an affirmative showing not only that the service is required in the convenience of the public proposed to be served, but that it is a necessity on the part of such public. The latter element includes a showing that the present facilities are inadequate for the transportation of the described commodities between the points involved."

Other decisions expressing this rule are:

John Joseph Norton Application, 1 M.C.C. 114;
Bluenose Bus Co. Application, 1 M.C.C. 173;
Lincoln Trails System, 28 M.C.C. 373;
West Coast Bus Lines, Ltd., 32 M.C.C. 619;
In re Justice, 2 M.C.C. 699;
In re Doyle, 3 M.C.C. 436;
Lake Champlain Transport Line, 4 M.C.C. 125;
Smoky Mountain Tours Company, 10 M.C.C. 127.

None of the findings held to be controlling in the cases cited were made in the case at bar. There is no finding of inadequacy of existing facilities nor that there is any insufficiency of good service. There is no finding that existing carriers are unable to satisfy all reasonable or well founded transportation requirements. There is no finding that there is need for or traffic to support even one added through line, and certainly none which would justify two. There is no finding that existing carriers would not be seriously impaired, contrary to the public interest. There is no finding that either new operation could reasonably be expected to be self-sustaining. There is no finding that Consolidated is able, financially or otherwise, to

conduct the proposed operation.

The foregoing decisions clearly outline the affirmative duty resting upon the Commission concerning the determination of basic facts necessary to support the grant of authority to an applicant carrier. When these rules are applied to either or both of the proceedings before the Commission, the conclusion is inescapable that its factual determinations are so meager as to make it impossible for a court to determine whether any grant of added authority is warranted. For a greater reason, the decision of the Commission entirely fails to support a grant of authority for two new through lines in competition with each other and with existing carriers, which subject the Commission apparently failed to consider or ma .e any findings upon. Its conclusion that:

> "For reasons which are obvious, authority should be granted or denied to both applicants to operate over the Valley route"

with no findings whatever which even remotely suggest what these "obvious" reasons are, lacks any factual support upon which a court may rely. The defect is necessarily fatal to the validity of the order, as the District Court has concluded and found.

III

THE DISTRICT COURT PROPERLY HELD THAT THE COMMISSION FAILED TO CONSIDER PUBLIC INTEREST AS OPPOSED TO

THE CONVENIENCE OF THE APPLICANTS.

On this issue the opinion of the District Court contains the following comment:

> "Not only did the Division fail to find affirmatively upon the vital matter of interest and convenience of the public, but the entire approach to the problem was as though the controversy were ruled entirely by the private interests represented in the record. The predominating color imparted to the report by this attitude may be envisioned by a close view of the following matters: First, it is said the genesis of the difficulties lies in the attempt of Consolidated to force O.N.C. to join 'Freightways'. The majority of Division 5 seems to have feared that the two carriers might fail to cooperate in the future if the situation developed further along these lines. Then it is indicated that these two carriers handled the bulk of traffic on this route in the cooperative operation at the time of the hearings. Finally, it is said: 'For reasons which are obvious, authority should be granted or denied to both applicants to operate over the valley route.' Thus the Commission indicated that Consolidated and O.N.C. had proprietary rights in the use of this highway because of previous operations, and that such rights were paramount * * * . (67)
>
> "The entire report is characterized by an approach to the problem as if the interests of Consolidated and O.N.C. were paramount." (68)

While the report of the Commission contains a heading entitled "Public Convenience and Necessity", (27) an analysis thereof will disclose it consists largely of a recital of evidence, the conclusions of the Commission, which we have hereinbefore analyzed, being embraced in the topic, "Discussion and Conclu-

sions". (37) Analyzing this "Public Convenience and Necessity" section of the report it will be noted:

1. The first paragraph discusses the testimony of a professor of economics who presented his views as an economist concerning the advantages or an assumed or hypothetical 24-hour faster truck service, for which the record contains no adequate support. The report also notes the opinion of the witness that disruption of the finances of a transportation company is very damaging to the public and any changes which might break down schedules and cause a collapse in existing transportation facilities would be a very important thing to consider in determining public convenience and necessity. No conclusion is expressed on the part of the Commission as to whether public interest would in this case be adversely affected by a proposed duplication in service. (27)

2. The succeeding five paragraphs discuss the contentions of the respective parties concerning the feasibility of the proposed speed-up in service urged in support of the proposed applications, and refers to testimony of certain protestant witnesses to the effect that the proposed 24-hour service between Portland and San Francisco could not be conducted with safety. The expressed conclusion of the Commission on this highly controversial issue evades and does not decide it. It is said:

> "We conclude that *applicants should be given the benefit of whatever doubt may exist* as to their ability to maintain the proposed time schedules. *If the proposed speed-up of service is practical* for applicants, it also is feasible for other carriers competently managed." (29)

It is to be noted that here, as on all other controversial issues, the burden of proof has been waived, apparently for lack of conviction on the part of the Commission and because of unwillingness to ascertain and find the facts. The conclusion is inescapable that in waiving the required proof the Commission subordinated public interest to the interests of the respective applicants.

3. The next four paragraphs relate to mechanical refrigeration and discuss the conflicting evidence relating to the advantages and disadvantages of different types of refrigeration. No conclusion is expressed nor is any determination made as to what type of refrigerated service will best serve the public interest, how much is required, or whether existing carriers are able to provide it. (29)

4. The succeeding three paragraphs (30-31) discuss service to intermediate points in a very superficial and incomplete manner. Although the report at another point lists seven motor carriers and the joint service of the two applicants, operating over U. S. Highway 99, in addition to the service of Southern Pacific Company and Railway Express Agency, making ten services in all, (18-27) the Commission con-

siders under this topic the service of only two. As to one of the two, Los Angeles-Seattle Motor Express, it is merely observed that this company, during August, 1940, had no traffic to or from Grants Pass or any other point in Oregon south of Eugene, that traffic during that month between San Francisco on the one hand and Eugene and Salem, Oregon, on the other hand, was small, and commented on the lack of telephone listings at intermediate points between San Francisco and Portland. The Commission failed to note the scope and extent of this carrier's connections with local transfer companies for the handling of service to and from intermediate points.

As to the other carrier mentioned, Pierce, the Commission noted that it holds the right to serve all intermediate points and had increased its service to a daily basis shortly prior to the hearing, but avoided any consideration of or conclusion concerning the sufficiency of this service to meet the public needs by the evasive comment that

> "Some of the witnesses were not familiar with the fact that this protestant was offering a daily service." (30)

Certainly shipper ignorance concerning the scope and quality of existing service may not relieve the Commission of its duty to ascertain and find whether that existing service is adequate to meet the public needs. It is particularly significant that this carrier, whose operating rights were not finally determined

until after the close of the hearings herein, had, prior to the hearings, instituted exactly the character of service which witnesses for applicants advocated, to and from all points. Proper consideration of the issues of public convenience and necessity required a determination of the question "whether the proposed service will serve a useful public purpose, reponsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; * * *". Until the Commission shall have determined, as to these intermediate points, that there is some inadequcy in the service of Pierce and of the eight other motor carriers whose service is not mentioned in this discussion, it may not reasonably be asserted that the issue of public convenience and necessity has been considered or decided.

4. Of the remaining paragraphs of discussion under the topic "Public Convenience and Necessity", two and one-half pages are devoted to "Through Service". (31-34) The discussion is confined to the operations and proposals of the two applicants, the tonnage interchanged, their differences of opinion as to how the service should be conducted, their inability to agree and the determination of each to invade the territory of the other. As we have indicated at another point in this brief, the contention of protectants that the objectionable features claimed to result from the interchange are within the power of the two applicants to correct is noted but not decided. The entire dis-

cussion lays emphasis upon the claims of the two applicants and what they believe to be in *their* best interests. The question of public need or public interest is entirely avoided.

5. Two paragraphs are devoted to the subject "Eastern Oregon" (34-35) and the use of the Klamath Falls gateway to serve eastern Oregon, eastern Washington and southwestern Idaho points. Consolidated only is involved in this discussion. As is noted in the report "Consolidated now has operating rights over the route in question between Spokane and Klamath Falls, through which this traffic could be served. It was used at one time but abandoned because of disadvantage to O.N.C. (35) The Commission arrives at no conclusion concerning public interest in this matter, nor does it suggest or find that service by this route cannot as well be given under existing rights as under the rights applied for. Here also emphasis is placed upon the advantages to applicants rather than the public.

6. The remaining discussion under the heading of "Public Convenience and Necessity" is directed to the Coos Bay and Lakeview service not here involved. (35)

We have heretofore carefully analyzed, under subdivision II of this brief, the deficiencies of the Commission's treatment of the issues of the case as summarized under this topic "Discussions and Conclu-

sions". As we there pointed out, the Commission contented itself with a finding in the language of the statute resting such findings upon the conclusion that authority should be either granted or denied to both applicants, with utterly no determination of a public need for any added route or routes, or of any inadequacy of existing service. Thus the Commission has clearly proceeded upon the theory that the protection of assumed proprietary right of the two applicants, rather than the public interest, was the controlling factor, notwithstanding the statutory provision:

> "That no certificate issued under this chapter shall confer any proprietary or property rights in the use of public Highways (49 U.S.C.A. Section 307 (d)

and notwithstanding also the clear rule of the cases hereinbefore cited that in such matters public interest is paramount. The failure of the Commission to consider public interest as the paramount issue, as opposed to the private interests of the two applicants, is a material jurisdictional defect which invalidates the order under attack. The findings and conclusions of the District Court to this effect should be sustained.

IV

IN DECIDING CASES ON A STALE RECORD AND IN REFUSING REHEARING NOTWITHSTANDING GREAT CHANGE IN CONDITIONS A FULL AND FAIR HEARING WAS DENIED.

This record was closed on October 29, 1940, or more than a year preceding the Pearl Harbor incident. The order of the Commission was entered two years and four months later when the nation was engaged in a global war, the duration of which was highly problematical. Perhaps nothing in the history of the nation has so vitally affected our business and economic life. Transportation conditions have perhaps been more vitally affected than any other phase, and nowhere have these changes been greater than on the Pacific Coast.

It is also significant that, shortly following the close of the hearings, clarification of the operating rights of the pioneer carriers serving between Pacific Coast points by the belated action of the Commission on their several "grandfather" applications permitted the development of their service and substantial additions to their equipment. New connections and arrangements for joint through service, with interchange of equipment, particularly on the part of the applicants herein, resulted in the establishment of through service by each applicant identical with that proposed herein insofar as through operation of equipment is concerned.

Therefore, regardless of whether the underlying findings of Division 5 find support in the obsolete record, they were untrue on the date the order was entered and they are untrue now. The most that may

be said for alleged statements of fact in the report is that they constitute a partial and incomplete history of motor transportation operations in the territory before the beginning of the war.

In the light of the ruling of the United States Supreme Court in *Atchison, Topeka & Sante Fe Ry. Co. v. United States,* 284 U.S. 248, concerning the subject of stale records, it should be unnecessary to say more on this point than that Appellees herein, upon the receipt of the order of Division 5, filed a petition for reconsideration and further hearing. (110, 2485) pointing out specifically the true fact as to each statement of alleged fact in the report. Appellees undertook to present evidence on a rehearing showing that all controlling facts relied on by the Commission for the support of its order were untrue. Indeed the Commission itself had on later records found them to be untrue, and we so urged, but without avail.

Among other things, we pointed out that proposed "hot-shot" schedules promised by applicants, requiring highway speeds averaging better than 52 miles per hour, and upon which the Commission seems to rely as one reason for granting the applications, would be directly contrary to the orders of the Office of Defense Transportation limiting speeds to 35 miles per hour. (110, 2487-2495)

We pointed out that both applicants had already corrected the temporary difficulties resulting from

their mutual disagreement and had arranged with other connections for the furnishing of through service, without interchange. (110, 2511-2512)

We also pointed out that all existing carriers, upon having their operating rights determined, had added substantially to their equipment. Los Angeles-Seattle Motor Express was shown to have added nine complete refrigerated truck and trailer units, four of which were mechanically refrigerated. Colletti, who had eight units, none mechanically refrigerated at the time of the hearing, had seventeen at the time of the petition for rehearing, three of which were mechanically refrigerated. System Freight operated only eight units at the time of the original hearing; at the time of our petition for reconsideration it operated thirty units, eight of which were mechanically refrigerated. Pierce had eighteen units in road service, including one mechanically refrigerated trailer; it had twenty-three on the date of the petition, including an additional refrigerated unit. Its California schedules had been doubled. Mitchell, at the time of the hearing, had only three units in service, all in bad condition, none mechanically refrigerated. At the time of the order he had eleven well maintained units of his own in service and much under lease. (110, 2514-2515)

These five carriers alone had increased their road units from 57 to 110 and operated at least seventeen mechanically refrigerated units; nearly 100% in-

crease in total units operated, and seventeen times as many mechanically refrigerated units.

All of this, and much more, including marked changes in operating conditions due to the war emergency, was urged in justification for further hearing. Our petition was refused.

But protestants were not alone in their plea that the record was stale. Applicant Oregon-Nevada-California Fast Freight, Inc., in connection with its exceptions to the report of the examiner recommending denial, filed a petition for rehearing as early as November 28, 1941, fifteen months before the order was entered, urging that the record had already become obsolete. Among other things, this applicant urged:

> "Many changes have occurred in the volume and flow of traffic. Many changes have occurred in operating conditions. Many changes have occurred in the physical operations of the applicant having a direct bearing upon the instant application. It is respectfully urged that a full and proper consideration of the application requires bringing these facts and factors into the record. * * * The testimony in the record pertaining to the volume and flow of traffic is now ancient and outmoded and does not reflect present conditions. * * * Substantial changes have taken place since the close of the instant record in applicant's arrangements with connecting carriers which have a material bearing upon the instant application. * * * The foregoing factors arising since the close of the instant record are necessary and vital to a full and complete consideration and disposition of this application. * * *" (105, 2484)

There can be little doubt concerning the truth of these assertions, as the decisions of the Commission in other cases so conclusively demonstrate. But more than a year later the case was decided without rehearing, and after changes even more drastic had occurred.

It is interesting to observe the reason assigned by the Commission for its denial of the petition of Oregon-Nevada-California Fast Freight, Inc., for rehearing. This is embraced in a paragraph designated "General", where it is said:

> "In its exceptions, O.N.C. also requests a further hearing, but in view of our conclusions herein it is doubtful whether it would still desire such further hearing. Its request for further hearing is hereby denied." (41)

It is too clear that the ground for denial of rehearing at this time was merely that since their determination was favorable to the petitioner, that particular petitioner might not be disappointed if rehearing was not granted. It certainly was not because the Commission believed the then record truly reflected existing conditions, for more than a year had elapsed since the applicant concerned had assured them the record was already stale, and two years and four months had elapsed since the close of the record. If the denial had been because of a conviction that the record did in fact fairly represent then conditions, certainly the Commission would have said so.

Thus our interests were jeopardized without a full

and fair hearing, upon a record two years and four months or more old, which, at the time of the order, did not contain a single reliable truth which had not long before become but history. The Commission refused entirely to consider the results of the war economy upon the operations of these Appellees and other carriers. It ignored the undeniable truth contained in the dissenting opinion of Commissioner Rogers that "at this time, when it is necessary to conserve rubber and gasoline, it seems to me to be wasteful to allow the inauguration of the proposed service." (42)

In the discharge of the duties of the Commission a fair hearing is a fundamental requirement. (See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88, 91, and *Morgan v. United States*, 298 U.S. 468.

As the Court below has suggested, the denial of rehearing is given greater significance by the Commission's unannounced and unanticipated approach to the issues and by its failure to give notice to the parties that the question of two new separate lines was to be considered and decided. In the language of the Court: "If the Commission had simply held renewed hearings and found upon the changed facts, and upon notice to parties that the question of two new separate lines was to be considered, the Court, as well as everyone, might well have been satisfied that they intended to find that the public interest as now established, demanded the changes." (71)

The Commission Found on Later Records That Public Convenience and Necessity Does Not Require Added Service

We are quite well aware of the policy of this Court, in the absence of abuse of discretion, to accord to the Commission the privilege of determining under what circumstances rehearing is justified, and we do not here question the soundness of this practice. But not only do the matters hereinbefore discussed demonstrate an abuse of discretion in denying rehearing where *all* of the controlling facts have changed, but the Commission itself has by formal decision confessed to its error in this case by findings directly contrary to those required to support its order herein. Since the close of the records in the challenged proceedings, and while the issues thereof were awaiting decision, the Commission directly or indirectly passed upon the issue of public convenience and necessity for identical service over the identical routes in three separate proceedings, and in each instance found public convenience and necessity had not been shown. In one instance the Commission found existing service to be adequate over the involved routes.

Docket No. MC-18231 Sub. 4 before the Commission was a similar public convenience and necessity application filed by a corporation known as Oregon Express. This application involved proposed service between Portland and San Francisco via both the

Medford and Klamath Falls gateways, proposing the use of these routes as an alternative route in lieu of a less practical route via U. S. Highway 101 and U. S. Highway 99. This application was opposed by substantially all carriers operating over the route, who made an exhaustive showing of their equipment and facilities and their ability to adequately serve the public needs. It was clearly shown that what was actually proposed was a new service duplicating the existing and adequate service already afforded by protestants. (113, 2617)

On this later record, concluded on January 31, 1942, or approximately fifteen months following the close of the record in the challenged proceedings, the Commission by Division 5, all members concurring, found that existing motor carriers "are in a position to handle additional traffic and are able to add more equipment if the traffic requires it", and "There is no evidence that the described arrangement (by which the equipment of O.N.C. was moved through to Portland under lease) had not satisfactorily met the public need; * * * or that the present available transportation facilities are inadequate to meet the public demand." * * * "What it actually proposes is a new service between points already adequately served". The decision concludes with a finding that public convenience and necessity for the proposed operation had not been established (113, 2614-2617)

It seems evident the Commission was compelled, after such findings, either to take judicial notice of them in the O.N.C. and Consolidated cases and reach a like conclusion therein, or to grant a rehearing to bring the stale records up to date so as to reflect these controlling facts which were equally applicable to all cases.

In two finance proceedings wherein Consolidated sought permission to acquire existing carriers for the purpose of completing a through route to San Francisco, Division 4 of the Commission, on records later than in the cases under consideration here, such proceedings bearing Docket Nos. MCF-1317 and MCF-1358 held, on October 5, 1942, that:

> "The transaction involves more than mere substitution of one operator for another. It also involves questions of public convenience and necessity not distinguishable from those involved, and primarily for consideration, in applicant's pending section 207 applications (extension applications). Considering applicant's resources and stated plans with respect to expansion of operations, it is apparent that consummation of the transportation would cause Fast Freight and other carriers operating between San Francisco and Medford and Portland to lose a substantial portion of the traffic they are now hauling. The evidence here will not support a finding that the traffic available in the territory considered can support profitable operations both by existing carriers and an additional operator such as applicant. The loss of traffic by existing carriers would be likely to impair their ability to render an adequate service over their routes." (111, 2580)

A similar conclusion was reached by Division 4 in passing upon the simultaneous applications of O.N.C. in Dockets MCF-1411 and MCF-1412, the Commission holding that the transaction involved questions of public convenience and necessity. (112, 2598)

It will be observed that the decision of Division 4 in these latter proceedings, which was entered April 23, 1941, was concurred in by all three members of the Division, one of whom was a member of Division 5 who joined in the majority report of that Division in the cases here under review.

Appellants do not challenge the right of the Commission or a Division thereof, under appropriate circumstances, to change its views or to make decisions inconsistent with prior determinations. We do, however, challenge the right of the Commission or any Division thereof to base its changed decision upon a record older than the one upon which the first determination is based where identical issues are involved.

We urge that since the Commission as late as September 26, 1942, on a record closed January 31, 1942, had determined existing service over the identical routes to be adequate and that public convenience and necessity did not require added service,—any record involving identical issues closed prior thereto, even though sufficient to sustain a different conclusion, was too stale to be depended upon. Obviously both conclusions could not be right. This formal

determination in the later case is necessarily binding upon it. Its refusal, under such circumstances, to grant rehearing constitutes an abuse of discretion which invalidates the order under attack.

V

THE DISTRICT COURT PROPERLY HELD THAT THE GENERAL CONCLUSIONS OF ABILITY TO PERFORM THE PROPOSED SERVICE ARE NOT SUPPORTED BY FACTS FOUND RELATIVE TO CONSOLIDATED OR BY SUBSTANTIAL EVIDENCE.

The Motor Carrier Act, 1935, requires, as a condition to the granting of a certificate of public convenience and necessity to an applicant, that the Commission shall find, among other things,

> "that the applicant is fit, willing and able properly to perform the service proposed * * *."

The ability of Consolidated to perform the service proposed under the application under consideration was challenged by appellees and other protestants in the proceedings before the Commission and substantial evidence in support of such challenge was offered and received.

A conclusion, embracing the language of the statute with respect to the ability of Consolidated to perform the proposed service is admittedly embraced in the report of the Commission. However, as the Court

below has pointed out, while there are supporting findings of basic fact upon the issue relating to O.N.C., the conclusions of the Commission upon this subject are not at all supported by facts found relative to Consolidated.

The subject is discussed by the Commission under the general heading of "Fitness" wherein it is stated: (40)

> "There is no doubt as to O.N.C.'s fitness, financial or otherwise, to conduct the operations herein authorized, although protestants question Consolidated's financial ability to conduct the proposed operation. Protestants contend that if these applications are granted each applicant will operate at a loss. Each applicant of course claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford. Elimination of the cost of transfer at Medford would save approximately fifteen or sixteen hundred dollars a month. Considering the facts heretofore discussed in some detail, we are of the opinion that we should give applicants the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein."

Thus the Commission merely recites the existence of an issue upon which it confesses itself in doubt, resolves the doubt in favor of the applicant, and fails entirely to find any basic facts to support its conclusion, although it was in duty bound to find these facts before authorizing the issuance of a certificate.

This brief outline fully sustains the conclusion of the Court below that the report of the Commission is

in this respect fatally defective. But the Court below also found that there is no evidence in either record to support the required finding which the Commission failed to make. This conclusion of the Court is amply sustained by the record to which we will briefly refer.

In approaching consideration of this subject, attention is directed to the fact that Consolidated proposes four round trips daily over the entire route between San Francisco and Portland, a distance of more than 700 miles, or an added daily operation of over 5600 miles.

Consolidated was reluctant to admit or to indicate to the Commission how much equipment would be required for this 5600 miles of added daily service, implying that only five added units, costing $9,000.00 each and fourteen super-chargers costing $500.00 each, would be necessary. If we accept these conservative estimates of new equipment, an investment of $52,000.00 is indicated. An estimate of $100,000.00 would seem more nearly accurate.

In addition, a substantial investment in terminal facilities will obviously be required. In addition to capital investment, the pioneering of such a substantial extension requires a large outlay of working capital. Bearing these facts in mind we point out the irrefutable facts shown in this record concerning the deplorable and strained financial position of Consolidated as established by an expert witness who had

made a thorough analysis of the financial reports of Consolidated to the Interstate Commerce Commission and to the Public Utilities Commissioner of Oregon.

This analysis is embraced in the testimony of witness Buell (103, 1304, 1422) and his Exhibit 64 before the Commission. (104, 1495) From this it appears that Consolidated had a net working capital deficit for every year 1935 to 1939 inclusive, the lowest being a deficit of $40,640.71 in 1936, and the highest being $213,766.12 in 1939, there being a net decrease in working capital of $138,160.50 in a single year. An analysis of the August 31, 1940, statement of Consolidated indicated that the deficit on that date was $84,471.82 greater than at the end of 1939, the total working capital deficit being $298,237.94. (103, 1425)

In addition to this staggering deficit, other records disclose Consolidated had applied for permission to endorse notes of a subsidiary in the amount of $70,000.00 and to acquire added stock in that subsidiary in the amount of $40,000.00. (103, 1308)

Another statement to the Interstate Commerce Commission showed that as of the end of May, 1940, Consolidated had added more than $110,000.00 to its investment in fixed assets, which sum had increased to $215,922.87 as of August 31, 1940. Consolidated had hypothecated its equipment to the extent of $334,000.00 and more than One Million Dollars of value in equipment had been pledged not only for long term

obligations but for current obligations as well. The witness expressed the opinion that it would be a very serious matter for Consolidated to expend any sums of money for added equipment. (103, 1309-1310)

The testimony of witness James, President of Consolidated, disclosed that at the close of the hearing this company had applications on file with the Commission requesting authority to issue $100,000.00 in promissory notes for the purpose of purchasing license plates and meeting past due obligations. (103, 1417)

Thus it was conclusively shown that the ambitious program of extentions carried on by Consolidated had already been carried far beyond the bounds of reason, a conclusion positively established by the fact that as of March 31, 1940. it was able to carry on only by the grace of its creditors, whose money was being used for current purposes to the extent of nearly $300,000.00, and in addition it was necessary for the company to borrow $100,000.00 more for current necessities.

The seriousness of this situation is increased by the certainty established in this record that substantial operating losses will be incurred in connection with the extravagant program proposed in these proceedings. It is significant that it is admitted by witness James that no traffic survey was made and no traffic statistics compiled as a foundation for his de-

termination to file the pending applications, nor does the record contain any evidence on the part of Consolidated, except the most general and unsubstantiated verbal statements, that would even suggest the probability of a profitable operation. The only traffic statistics in the record bearing on Consolidated's operations were produced on the formal demand of counsel for appellees. They are contained in Exhibit 10. (104, 2437) When analyzed it is readily understandable why this applicant was unwilling to voluntarily present them as a part of its case.

This exhibit discloses a substantial northbound movement from California to the northwest, heretofore interchanged with O.N.C., but the startling fact is the deplorable lack of southbound tonnage with which to balance this movement. Witness James frankly admitted that the load factor is the most important point to consider in establishing a remunerative operation (1927) yet proposed an operation which, even though he obtained all of the business theretofore interchanged with O.N.C., would require the operation of three empty units southbound for every loaded unit.

From the foregoing analysis of facts of record which Consolidated was unable to refute, it is clearly established both from the standpoint of the original fixed capital investment required and from the standpoint of earnings to accrue from the proposed opera-

tion, Consolidated failed to show either fitness or ability to move and conduct the proposed operation, while appellees demonstrated that from both viewpoints this applicant was not fit or able. The conclusion of the District Court in this respect is thus amply sustained by the record.

VI

THE TARDY DEFENSE OF LACHES WAS PROPERLY STRICKEN.

On the day of trial in the District Court and after appellees had offered a part of their evidence, counsel for Consolidated interrupted to call attention to his pending petition for leave to intervene, and for the first time presented an amended answer which he sought leave to file. (107) This answer, in addition to admissions and denials conforming substantially to those of the defendant and intervener, Interstate Commerce Commission, embraced three extraneous affirmative defenses substantially broadening the issues as framed by the complaint and the answers of the United States and of the Interstate Commerce Commission. Among these attempted defenses and as its first affirmative defense, Consolidated alleged that the order of the Commission became final on August 2, 1943, that the certificate was issued September 7, 1943, and this action was instituted January 7, 1944, exactly four months following the issuance of the certificate and approximately five months following the denial of the petition for reconsideration.

The intervention of Consolidated, as well as that of O.N.C., was permitted by the Court, but such intervention limited to the scope of the previously filed pleadings of the United States and the Interstate Commerce Commission, the affirmative defenses which would have substantially broadened the issues being stricken by order of the Court from the answer of Consolidated. (110)

The merits, if any, of the attempted defense of laches was not presented or argued to the District Court nor was it suggested that Consolidated desired or intended to offer any evidence to show that any damage had been sustained by it by reason of the four months' delay in filing of plaintiff's complaint. (107-110)

In any event the presentation of the issue by the proposed amended answer on the morning of the date of trial and after presentation of evidence had commenced was obviously untimely and since it also raised issues not presented by the defendant, United States, and thus unduly broadened the issues in a manner which would have necessitated a lengthy postponement of the trial, it was properly denied.

In the *American Trucking Association, Inc. et al v. United States, et al*, ... U.S. ...., 89 L. Ed. 1463, decided June 18, 1945, this Court refused to sustain a plea of laches in a similar case where suit was brought eleven months after the issuance of the cer-

tificate.

The belated presentation of the defense, the failure of counsel for Consolidated to urge it before the District Court when opportunity was afforded, the lack of any offer of proof of damage, coupled with the obvious fact that four months delay could not properly constitute laches where numerous parties and issues are involved, ably demonstrate that the attempted defense was frivolous and the assignment of error without merit.

VII

THE CONCLUSION OF THE DISTRICT COURT THAT PLAINTIFFS WERE DENIED A FAIR HEARING CONFORMS TO ISSUES OF THE CASE.

Assignment of error No. 25 challenges the conclusion of the District Court that plaintiffs were denied a fair hearing upon the novel ground that such conclusion is based upon a theory neither pleaded nor argued. (90)

Since this assignment fails to specify or even suggest wherein the theory of the Court below differs from the pleadings or argument of plaintiffs, we find it difficult to discuss the question save in the most general terms.

Suffice it to say that sub-paragraph (1) of paragraph X of the complaint challenges the procedure of the Commission whereby the two records in separate

proceedings are treated as one, thus considering as evidence in each case evidence not offered or received therein (6); likewise in paragraph XI, plaintiffs allege that the denial of their petition for reconsideration, notwithstanding their offer to establish by competent evidence that all of the controlling statements of fact relied upon by the Commission to sustain its conclusions and order were untrue, deprived plaintiffs of a full and fair hearing on the issues. (8) Both issues were argued and briefed by all parties to the case. The District Court sustained these contentions saying:

> "Many instances can be quoted from the report to show that the finding, or conclusion, was based upon the record of the two proceedings without discrimination. Under these circumstances no presumption should apply. Cf. U. S. v. Chemical Foundation, 272 U.S. 1, 14-15. * * * A fair trial is not accorded by the method of approach here used. *Klinc v. U. S.*, 41 F. Supp. 577." (69)

The Court added:

> "No notice was given of the attempted conversion of an adversary proceeding by the two applicants to establish a basis for one through-line operation into a consolidated proceeding where both applications were granted." (69)

The Court's conclusion was that the obligation to preserve the essentials of fair trial was violated because no opportunity was given plaintiffs to maintain their rights or present a defense to installations of which none had notice.

At another point in its opinion the District Court discusses the denial of the petition for rehearing and after noting the age of the record and the kaleidoscopic and vital changes in the transportation field suggests that the record in this case may require the application of the rule applied by this Court in *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 284, U.S. 248.

In its formal findings, finding No. XVII holds:

> "No opportunity was given to plaintiffs to maintain their rights or to present appropriate protests and defenses to the institution of two competing through-line operations between San Francisco and Portland." (80)

Finding No. XVIII holds:

> "Since October 29, 1940, great changes have occurred in the field of transportation in the area affected by the proposed operation." (80)

As a conclusion of law the District Court finds:

> "That plaintiffs were deprived of a fair trial before the Commission." (80)

We know of no rule of law which requires a judicial tribunal to think or express its thought in the precise language of the litigant. It is clear appellees charged that the procedure followed by the Commission denied to them a full and fair hearing and that the Court so found. The assignment of error is unfounded and entirely without merit.

CONCLUSION

In bringing this argument to a conclusion, and without intent to minimize the other issues hereinbefore discussed, it is not inappropriate to restate certain established principles as to which there can be no dispute.

It is competent for the court to suspend an order of the Commission and it is the duty of the courts so to do if the order is entered in proceedings where a fair hearing has been denied.

If this Court reaches the basic conclusion that the proceedings before the Commission denied a fair hearing, it will, of course, find it necessary to uphold the decree of the statutory court suspending the order of the Commission even though the Court may reject the reasoning of the statutory court and may disagree with some of the legal principles enunciated by it.

For the Commission to consider in one proceeding any evidence not a matter of record in that proceeding constitutes a denial of a fair hearing.

In paragraph X of the complaint (6) it is charged that the Commission "erroneously and improperly considered, in each proceeding embraced in its report and order, evidence not offered or received in said proceeding and not properly a part of the record therein", a charge which, if sustained, establishes a denial of a fair trial. That was the basic issue before

the statutory court and remains the basic issue before this court.

That the Commission is perfectly conscious of the issues to be decided in connection with an application of a motor carrier under Section 207 (a) of the Act appears from its statement of these issues. (38) But in a determination of these issues, in order that a fair trial may be granted to the parties, each application must stand exclusively on the evidence and the record which supports it.

Application of the stated principles to the facts here results in certain inescapable conclusions.

For the purpose of this argument, it may be assumed that fair trials were held under the several applications of Consolidated and O.N.C. until the Commission differed from the recommendations of the examiner and took the applications in its own hands for determination.

When the Commission did this it said: "The issues of these proceedings are interrelated and the applications will be disposed of in one report". (10) And before it presented its final conclusions, the Commission said: "As seen, Consolidated and O.N.C. transport the bulk of the traffic between San Francisco and Portland. For reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley Route". (39)

We assert that in so holding the Commission necessarily, as a matter of both law and logic, carried over the entire record in each application into the other and gave the entire record supporting both applications consideration in determining the several applications of Consolidated and O.N.C. In order to grant an application under Section 207(a) of the Act the Commission must find "that the applicant is fit, willing and able properly to perform the service proposed * * *; that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." In addition to these statutory requirements, the Commission has correctly pointed out (38) that it must determine "whether the proposed service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by an applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

When the Commission established its own standard for its own guidance that "for reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley Route" (39), it imposed upon itself the making of an impossible determination by a consideration of the separate records in each application and indicated its

own mental concept that it could, as in fact it did, consider the O.N.C. record in passing upon the Consolidated application, and vice versa. It defined for its own guidance the alternative issues to be decided: (a) there must be granted both applications; or (b) there must be denied both applications. But it is obvious that in a consideration of the Consolidated application the Commission could not determine whether the O.N.C. application should be granted or denied without giving consideration to the record supporting the O.N.C. application, as it is equally obvious that in determining the O.N.C. application the Commission could not determine whether the Consolidated application should be granted or denied without giving consideration to the record in the Consolidated application. That, of course, is precisely what the Commission did, as is demonstrated by its own reasoning in the opinion which passed on what are characterized as interrelated proceedings. Having done this, the Commission itself denied the parties a fair trial—which it may be conceded had theretofore been conducted in the hearings on the separate applications.

What the Commission may do with these applications on rehearing is something with which the courts will not concern themselves. Appellees are under no illusions that it will be impossible or indeed particularly difficult for records to be made and decisions rendered which will be immune to any court review. They hope, of course, on rehearing to be able to con-

vince the Commission that both applications should be denied. The merits of the controversies, with the changed conditions which must be considered by the Commission on rehearing, warrant the hope that they will be able to persuade the Commission that the applications should be denied as other applications involving these routes have been denied. But these considerations do not bear upon the basic issue before this court for determination, which is, did the Commission deny a fair trial by following its own standard that both applications must be granted or both denied, thereby necessarily carrying over into each application the entire record in the other? We assert that this conclusion is inescapable and that the decree of the lower court suspending the order of the Commission must therefore be affirmed.

Respectfully submitted,

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Dated at Portland, Oregon,
January 14, 1946.

APPENDIX "A"

28 U.S.C.A., Sec. 41:

"(*Judicial Code, section* 24, *amended.*) *Original jurisdiction.* The district courts shall have original jurisdiction as follows:

* * * * * * * * *

"(28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

28 U.S.C.A., Sec. 45a:

"(*Judicial Code, sections* 212, 213.) *Special attorneys: participation by Interstate Commerce Commerce Commission: intervention.* The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assits in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right,

and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or procedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

28 U.S.C.A., Sec. 47:

"*Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any

circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such

appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

28 U.S.C.A., Sec. 47a:

"(*Judicial Code, section* 210.) *Appeal to Supreme Court from final decree; time for taking; priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgement or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court."

49 U.S.C.A., Sec. 305 (b):

"(b) *Creation of joint board; rules and procedure; nominations for membership; procedure on failure of board to act.* Whenever there arises in the administration of this chapter any matter that the Commission is required to refer to a joint board, or that the Commission determines, in its discretion, to refer to a joint board, the Commission shall, if no joint board eligible to consider said matter is in existence, create a joint board to consider the matter when referred, and to recommend appropriate order thereon. The Commission shall prescribe rules governing meetings and procedure of joint boards and may, in the event of legal proceedings preventing reference to a joint board, determine the matter as provided in section 17. Except as hereinafter provided, a joint board shall consist of a member from each State in which the motor carrier or brokerage operations involved are or are proposed to be conducted. The member from any such state shall be nominated by the board of such State from its own membership or otherwise; or if there is no board in such State or if the Board of such State fails to make a nomination when requested by the Commission, then the Governor of such State may nominate such member. The Commission is authorized to appoint as a member upon the joint board any such nominee approved by it. If both the Board and the Governor of any State shall fail to nominate a joint board member when requested, then the joint board shall be constituted without a member from such State, if members for two or more States shall have been nominated and approved by the Commission. All decisions and recommendations by joint boards shall be by majority vote. If the board of each State from which a member of a joint board is entitled to be appointed shall waive action on any matter referred to such joint board, or if any joint board fails or refuses to act or is unable to agree upon any matter submitted to it within forty-five days after the matter is referred to it or such other period as the

Commission may authorize, or if a member shall not be nominated for more than one State (except only when the operations proposed shall be into or through territory foreign to the United States), then such matter shall be decided as in the case of any matter not required to be referred to a joint board. The failure of a duly appointed member of a joint board to participate in any hearing on a matter referred to such joint board, after notice thereof, shall be considered to constitute, as to the matter referred, a waiver of action on the part of the State from which such member was appointed. When any proceeding required to be referred to a joint board shall involve operations of a motor carrier conducted or proposed to be conducted into or through territory foreign to the United States, if a single State shall be involved, or if only one State shall make nomination of a joint board member through its Governor or State board, then the Commission, in such case, may receive from that State the nomination of not more than three members and may appoint such nominees to constitute the joint board. Members of joint boards when administering the provisions of this chapter shall receive such allowances for travel and subsistence expenses as the Commission shall provide. A joint board shall continue in existence for the consideration of matters referred to it by the Commission until such time as its existence may be terminated by the Commission. A substitution of membership upon a joint board from any State may be made at any time by nomination and appointment in the same manner as an original nomination and appointment."

49 U.S.C.A., Sec. 17:

"*Commission procedure; delegation of duties; rehearings — Divisions of Commission; organization; composition* * * * *

"(10) Any matter arising in the administration of chapter 8 of this title as to which a hearing is to

be held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work, business or functions, as to which a hearing is to be held, to an individual Commissioner or Board."

49 U.S.C.A., Sec. 305 (g):

"(g) *Court review of Commission's orders; compelling Commission to take jurisdiction.* Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided*, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 43 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

49 U.S.C.A., Sec. 306 (a):

"*Certificate of convenience and necessity.*

(a) *Necessity for; motor carriers in bona fide operation on June* 1, 1935. Except as otherwise provided in this section and in section 310a no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by

motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of a bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And povided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

49 U.S.C.A., Sec. 307 (a):

"Issuance of certificate.

(a) *Issuance authorized to qualified applicants for regular routes and between fixed termini.* Subject to section 310, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity: otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor-vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

p. 15.

SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1945.

The United States of America, Interstate Commerce Commission, Consolidated Freightways, Inc., et al., Appellants, *vs.* Pierce Auto Freight Lines, Inc., Los Angeles-Seattle Motor Express, Angelo Colletti, et al.	Appeal from the District Court of the United States for the District of Oregon.

[March 11, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

The validity of an order of the Interstate Commerce Commission is in question. The order granted to appellants, Consolidated Freightways, Inc., and Oregon-Nevada-California Fast Freight, Inc., certificates of public convenience and necessity authorizing extensions of their operations as motor carriers. Appellees, competing carriers, some of whom are railway affiliates, were protestants in the proceedings before the Commission. They successfully attacked the order in a specially constituted District Court, on grounds questioning the sufficiency of the findings and the evidence, as well as the propriety and fairness of the Commission's procedure. The District Court's decree, 57 F. Supp. 192, "suspended" the order and remanded the cause to the Commission for rehearing although a stay pending appeal was denied.

The shortened statement of the major thing in controversy is whether the appellants, Consolidated and O. N. C., properly were allowed by the Commission to substitute wholly independent and competing through services between Portland, Oregon, and San Francisco, California, for the service which they jointly rendered between those cities, prior to the filing of these applications, by interchanging freight at intermediate points. The protesting appellees were carriers competing with the joint service of Consolidated and O. N. C. and will be competitors of each, as those companies will be with each other, if the Commission's order is sus-

tained. This fact is the source of the controversy and is important to bear in mind for full understanding of the detailed facts and issues as well as of what is ultimately at stake. Although each appellant originally sought exclusive authority to conduct the proposed through operation in substitution for the former joint service, and thus opposed the other's application, both now seek to sustain the Commission's order, as of course does the Commission itself.

At the time of Consolidated's application in December, 1939, it operated various routes in the Northwest, some extending eastward from the Portland and Seattle areas, in addition to the joint service by interchange with O. N. C. southward from Portland to San Francisco.[1] Two of these routes, comprising part of the latter service, extended from Portland southerly to Medford and Klamath Falls, both of which lie just north of the Oregon-California boundary and were points of interchange with O. N. C.[2] In so far as it is now pertinent, Consolidated's application sought permission to extend its operations from Medford and Klamath Falls southward to San Francisco,[3] in other words, over the portion of the route previously used in the joint service for O. N. C's operations.

Conversely, at the time of O. N. C's application in January, 1940, it was operating from San Francisco to Medford and Klamath Falls.[4] It sought to extend its operations from Medford to Portland and, as an alternative slightly longer route, from Klamath Falls to Portland through Goshen, Oregon.[5]

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[1] There are two main north-south highways between the San Francisco and Portand areas, U. S. 101, the so-called Coast Route, and U. S. 99, roughly parallel but some miles inland, called the Valley Route. The joint service was conducted over the latter and the applications of Consolidated and O. N. C. each sought to extend operations over this route.

[2] The joint service followed Highway 99 from San Francisco nearly to the northern boundary of California, from where part continued on No. 99 to Medford and the remainder followed a separate highway to Klamath Falls, this leg of the journey being made with O. N. C.'s equipment in both directions. Consolidated's "leg" between Portland at the north and Medford and Klamath Falls at the south followed different, but substantially parallel, highways, the westerly route being No. 99.

[3] Consolidated also sought authority to extend its service from Marshfield, Oregon, to San Francisco over the Coast Route, see note 1, and from Lakeview, Oregon, to Redding, California, through Alturas, California.

[4] O. N. C. also operated a route from San Francisco to Elko, Nevada.

[5] O. N. C. also sought authority to serve Marshfield, Oregon, and other points in the Coos Bay area.

Thus, in effect, Consolidated and O. N. C. each sought to conduct operations independently throughout the entire distance between Portland and San Francisco.[6] The occasion for the separate applications was O. N. C.'s refusal to join an association of connecting carriers which Consolidated was sponsoring.[7]

The applications were heard separately, as the statute requires, before different joint boards.[8] However, because they were so closely related in their common features, the hearings were held at the same places and one application was heard immediately after the other. Each applicant intervened in the proceeding on the other's application, and various parties, including the appellees,[9] appeared in opposition in both proceedings. The parties stipulated that much of the evidence presented in the O. N. C. hearing should be introduced by reference into the Consolidated record. This included all of the appellees' affirmative evidence in opposition to the two applications. The hearings thus were substantially coordinated, though not technically consolidated, for the common features of the applications.

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[6] The Commission stated in its report: " . . . O. N. C. and Consolidated have interchanged freight at Medford for over 11 years and at Klamath Falls for over 6 years to give joint through service between points served by each. Since July 1939 about one-third of the tonnage has been handled through interchange of trailers. At first, the amount of interchanged traffic was small and Consolidated's principal business was of a local nature to and from Medford. Apparently, O. N. C.'s principal business also was local. The interchange business has since increased until it far exceeds that of the local business."

[7] Although the president of Consolidated admitted at the hearing that O. N. C.'s refusal to join the association had a substantial influence in causing the filing of Consolidated's application, he could not say whether or not that application would have been filed if O. N. C. had joined.

[8] Section 205(a) of the Interstate Commerce Act, 49 U. S. C. § 305(a). Apparently the reason that the two proceedings were not consolidated and heard before one joint board arose from the fact that, although the major issue, whether or not a through route between San Francisco and Portland should be allowed, was common to both cases, certain other issues were not and, since some of the latter relating to O. N. C. affected operations in Washington as well as in Oregon and California, a differently constituted board was required for making recommendations concerning them. Cf. American Trucking Assn. v. United States, 326 U. S. 77, 81-83.

[9] There are five appellees. Pierce Auto Freight Lines, Inc., Los Angeles-Seattle Motor Express, and Angelo Colletti (doing business as Colletti Fast Freight), are common carriers by motor vehicle which operate between Portland and San Francisco. Pacific Motor Trucking Company is a subsidiary of Southern Pacific Company and performs certain motor vehicle operations which are auxiliary to the rail services of the Southern Pacific Railway. Pacific Southwest Railroad Association is an unincorporated association of railroads serving the Pacific southwest territory, organized to protect rail interests as they may be affected by motor carrier operations in that territory.

As neither joint board could agree upon the recommendations to be made, both matters were referred to an examiner.[10] In separate reports he recommended the denial of both applications. Division 5, with one commissioner dissenting, dealt with both in a single report. It reversed the examiner in both cases and ordered that each application be granted.[11] Appellees' petition for rehearing was denied. They thereupon brought this suit in the District Court.[12]

The findings of fact and the court's opinion, 57 F. Supp. 192, disclose that it held the Commission's order invalid on several grounds. One was that "the Commission considered the separate records as though the case was a consolidated one. Evidence which appeared only in one record was used by the Commission to support general findings in the Report concerning both Consolidated and O. N. C. In each proceeding embraced within the Report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record therein was drawn upon and considered by the Commission." The court also found that there was no evidence in either record to support the Commission's finding that "the present and future public convenience and necessity require *both* the operations" by Consolidated and those by O. N. C. (Emphasis added.) And it further found that at no time in the proceeding had there been notice to the parties, the witnesses, or the general public that *both* applications might be granted; that indeed "the whole basis of the original proceeding before the Joint Boards was the question of whether *any* through-line operation between San Francisco and Portland should be allowed and, if so, *which one* of the two separate applications";

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[10] Section 205(b) of the Interstate Commerce Act, 49 U. S. C. § 305(b).

[11] The certificate of public convenience and necessity granted to Consolidated authorizes extensions of its routes from Medford and Klamath Falls to San Francisco and also from Lakeview, Oregon, to Redding, California. The certificate granted to O. N. C. authorizes extensions from Medford to Portland and from Klamath Falls to Goshen, Oregon. In both cases, operation was thus authorized over alternate highways. Cf. notes 3 and 5.

[12] The District Court permitted Consolidated to intervene and file an answer "with admissions and denials to the petition," but refused to consider and ordered stricken the affirmative defenses which Consolidated set up. One of these was that the appellees were guilty of laches in bringing the suit, since the certificates of public convenience and necessity were issued in September, 1943, and the complaint was not filed until January, 1944. Consolidated contends that the District Court erred in striking the affirmative defenses. In the view that we take of the case it is not necessary to consider this question.

and that "no opportunity was given to plaintiffs to maintain their rights or to present appropriate protests and defenses to the institution of *two competing* through-line operations between San Francisco and Portland." (Emphasis added.) Finally the court held that in granting both applications the Commission had not considered the public interest and suggested that its denial of the petition for rehearing was improper.[13]

For all these supposed errors the District Court suspended the Commission's order and remanded the cause "for rehearing." In doing so it said: "This action will be taken in order that all parties may be placed on notice as to what type hearing will be held, whether *joint or several, and in order that appropriate* findings be made as to the public convenience and necessity which requires the authorization of *two* new through-lines in competition with each other and in competition with the other facilities, and also as to the ability of Consolidated to initiate and maintain one of such lines *in view of present conditions.*" (Emphasis added) 57 F. Supp. at 198.

Obviously the court's objection was not to the manner in which the proceedings were conducted prior to the time when the hearings ended and the Commission took the cases under consideration. Up to this point no fault is found with what was done. The difficulty lay altogether, in the court's view, with the way in which it thought the Commission had considered the cases and reached its conclusions. And this arose entirely from the fact that the Commission disposed of them in a single report, rather than in separate ones for each case; and from the further fact that it concluded that both applications should be granted rather than that both should be denied or one denied and one granted.

We are not informed, of course, whether the court would have reached the same result if the Commission had written separate

[13] The District Court also found that "the Commission failed to find, and there was no evidence in either record to support such a finding, that each applicant was separately capable of equipping, maintaining, and conducting the proposed operation in the face of competition from the other"; that "the Commission's Report fails to disclose that it gave any consideration to the possibility of adverse effect upon any plaintiff of the institution of two through-line competitive operations between San Francisco and Portland"; and that "the Commission failed to find, and there is no evidence to support such a finding, that Consolidated is adequately equipped to establish and maintain the proposed through-line operations under any condition." These findings are considered below.

reports in each case, arriving at the same conclusions, although it seems suggested that any of the other possible results would have been impeccable, whether stated in separate reports or a single one. Obviously it was no sufficient ground for suspending the Commission's order that it chose to write one report rather than two, especially in matters as closely related as these, if the single report together with the findings and the evidence was sufficient to sustain the action taken in each case. It is not uncommon judicial practice to follow this course.

Nor, with those conditions satisfied, could the mere fact that the Commission concluded to grant rather than to deny both applications, or to grant one and deny the other, invalidate its judgment. For each application when it was filed sought to conduct the extended operation which it specified;[14] nothing in either foreclosed the possibility that both might be granted, although for obvious reasons each applicant opposed the granting of the other's extension; and from the beginning it was as much a possible outcome that both applications would be granted as that both would be denied or one be granted and one denied. If therefore the Commission had written separate reports in each case, reaching the same result, it would have been squarely within the issues and within the outcomes comprehended from the beginning; and the only questions for judicial consideration, absent some procedural deviation not now presented, would have been the sufficiency of the findings and the evidence to sustain its action in each case. We think those are the only questions of any substance arising upon this appeal.

The District Court, however, regarded the Commission's failure to write separate reports as indicating that it did not consider each case separately and exclusively on its own record, but looked to the evidence in both in forming its judgment. This "an-

[14] They were not the same, since *the extension* sought in each case covered the portion of the joint route over which the other applicant then was operating. But, of course, if one application had been granted and one denied, the practical effect would have been to award to the successful applicant the entire route of the prior joint service, and thus to exclude the unsuccessful one at least from any share in the joint operation; probably also from any practical opportunity of successful operation over its remaining "leg" of the previous joint service. These considerations no doubt were influential in leading the Commission to conclude that either both applications should be granted or both denied, since to grant one and deny the other, entirely apart from considerations relating to so-called "grandfather rights," would work obvious hardship on one. Cf. note 15.

proach" the court thought wrong, not only as showing that the Commission considered evidence in each case which it had no right to take into account, but also as injecting a new and important issue in both proceedings not previously regarded by the parties as comprehended within the applications and the hearings. The "new issue" thought to be thus injected was the possibility that *both* applications might be granted. From this basic idea other errors were pyramided, among them that the protesting appellees had been given no notice of the kind of proceeding which would be held and had been deprived of any opportunity to present proper protests and evidence relating to the allegedly newly injected issue.

The case has taken longer to state than the merits should require for its disposition. Appellees plant themselves here squarely on the District Court's objections to the Commission's "approach" and procedure. Two principal questions thus are presented: (1) Was evidence improperly considered by the Commission, so as to require reversal of its order; and (2) were new issues injected by its action in disposing of the cases with a single report? Other issues more or less related may be shortly disposed of.

We put to one side, in the first place, the idea that the Commission, by the manner in which it disposed of the causes, injected as a "new issue" the question whether both applications might be granted and with it the correlative notions that the appellees had no notice that this issue would be involved and no opportunity to make appropriate protests or to present evidence upon it. In a strict view neither the appellees nor the court were entitled to raise these questions. For it was not at any time suggested to the Commission, as it might have been upon petition for rehearing, that the proceedings had been conducted on the theory that both applications would not be granted. Appellees stated in their petition for rehearing only that "Division 5 has erroneously and improperly assumed that in granting one of the applications it is by force of necessity required to grant the other. . . ." This is very different from suggesting that the Commission was not entitled at all to consider granting both applications. It is highly questionable therefore whether the appellees have not waived this question. But the District Court, in raising it, has said that it was acting in protection of the public interest and we pass therefore to consideration of the issue on its merits.

The Commission did not, by the manner in which it disposed of the cause, inject as a "new issue" the question whether both applications might be granted. If the appellees actually assumed in the beginning that both applications could not be granted, their assumption was in the teeth of the applications and the permissible outcomes presented for the Commission's decision.

As has been said, the two applications were separately instituted and heard. In the natural course of events each joint board was to decide whether to grant or to deny the particular application before it. The possibilities therefore were that both applications might be denied, that one might be granted and the other denied, or that both might be granted. Moreover, the record contains evidence showing that the possibility of granting both applications was in the minds of counsel and witnesses.[15] And this possibility must have been apparent from the beginning, not only from the history of the prior operations and the primary cause for their impending disruption, but also from the obvious relations of the applications to each other, the equally obvious consequences to the applicants of granting one and denying the other.

[15] One example is sufficient. The president of Consolidated was asked: "From your experience in watching the development of this joint service, what do you expect the effect to be of the granting of this application upon the existing carriers between San Francisco and Medford and San Francisco and Klamath Falls?" He replied:

"Treating them separately, south of Medford we have in our operation the Oregon-Nevada-California Fast Freight and the Pacific Truck Express and the Pierce Auto Lines.

"The California Fast Freight are concurrently applying for the right to extend their services north of Medford to Portland. The net result of the granting of their application and our application would be the splitting of the traffic between the two companies. We would each take part of the present business we are now jointly handling, and operate our equipment straight through.

"In my opinion this will result in both of us operating about the same number of vehicles, about the same number of miles; and if our divisions of revenues of the past have been properly arranged, we continue to gross about the same amount of revenue. It should result in our both having a more profitable operation, as it will eliminate the present waste of checking, weighing, and transferring freight at an intermediate point.

"The service would be improved and no doubt it would attract more volume. That is a conjecture. At the present time, both companies are maintaining terminal facilities in San Francisco so on our part it would mean very little increase in our terminal costs.

"It will mean an increase in terminal costs for the Oregon-Nevada-California Fast Freight, but the cost of it would be offset, in my opinion, by eliminating the cost of transferring the through freight at Medford."

In its report, the Commission stated, "*For reasons which are obvious* [see note 14], authority should be either granted or denied to both applicants to operate over the Valley Route." (Emphasis added.)

and the Commission's recognition of these facts by the manner in which it scheduled the hearings for substantially concurrent treatment. The parties too apparently gave similar recognition to the questioned possible outcome by their stipulation for the use of evidence in both proceedings.

The issue concerning whether both applications should be granted was injected, not by the Commission's report or any other action taken by it, but by the filing of the applications in the first place. If appellees misconceived the nature of the proceedings in this respect, as we do not think was the case, they were not misled into doing so by any action of the Commission or the other appellants.

We turn therefore to the objections made on the score of the Commission's findings and its treatment of the evidence. In our opinion they are equally untenable. The principal cause of complaint in these respects is that the Commission did not consider each case exclusively on its own record but looked to the evidence in both proceedings in forming its judgment. If this is true and if it has resulted in substantial prejudice to the appellees, as might occur, for example, if the Commission were shown prejudicially to have considered evidence bearing on one case which did not affect it and was presented in the other, and which appellees were given no opportunity to meet, the orders, or one of them, would be improperly grounded.

But no showing of this sort has been made. It is to be recalled that all of the appellees, as well as both of the applicants, were parties to both proceedings; were represented at all of the hearings, which were conducted at substantially the same times and places; and were given full opportunity to present all evidence they considered pertinent, to cross-examine witnesses and otherwise to protect their interests. Moreover, large portions of the evidence applied as much to one application as to another. This was true, for example, of the proofs relating to traffic conditions, shipper demands, the need for faster service and mechanical refrigeration, and other items. In these circumstances it is difficult to see how appellees could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in these two proceedings.

Nor indeed do they succeed in showing such prejudice. As we understand them, the most that they assert is that the Commis-

sion's report so commingles the two cases that it is impossible to determine which statements are supported by which record. But neither in the briefs, nor upon specific inquiry at the argument, were they able to point to any particular instance of prejudice. Nor in fact does the opinion of the District Court, although it asserts that the report is filled with numerous instances of this sort. The assertion, we think, is colored by the court's erroneous idea that the report first injected the question whether both applications should be granted; and to the same cause, it would seem, may be attributed the court's undue discounting of the fact that upon this issue, as on the alternative possible outcomes, much of the evidence was identical, made so by the parties' own stipulation. In any event the appellees have not pointed to any specific statement in the report which is obviously applicable to both cases or which is required as a basic finding to support the order in one, which is without support in both records or in the one which is appropriate.

In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing.

Obviously it would be consistent neither with good sense nor, we think, with the type of hearing assured by the statute to force the Commission to put on such complete blinders. Whatever may be the limits outside which it cannot go in looking beyond the record in the particular proceeding at the stage of formulating its judgment, none certainly would go so far. And, given that the report contains all the essential findings required, cf. *Florida v. United States*, 282 U. S. 194, the Commission is not compelled to annotate to each finding the evidence supporting it.

It is true that ordinarily an administrative agency will act appropriately, in a proceeding of this sort, upon the record presented and such matters as properly may receive its attention through "official notice."[16] It is also true that this Court, in

[16] Cf. Judicial Notice by Administrative Tribunals (1934) 44 Yale L. J. 355; Faris, Judicial Notice by Administrative Bodies (1928) 4 Ind. L. J. 167.

appropriate instances, has limited the use of the latter implement in order to assure that the parties will not be deprived of a fair hearing. See *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 286-290; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93-94. But in doing so it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. *Market St. Ry. Co.* v. *Railroad Com'n*, 324 U. S. 548, 561-562; cf. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 154-155. In these cases no more is necessary than to apply that rule.

The remaining objections are directed more appropriately to the findings and their support in the evidence. Appellees say that the order granting both applications is defective in that it is not founded upon an express finding or indeed upon any finding that there was a need for two through-line operations which would be in competition with one another. They urge that it was not sufficient for the Commission to find, as it did on adequate evidence, that the existing service between Portland and San Francisco was inadequate; and to conclude, as the report expressly stated, that in view of this fact, among others, "public convenience and necessity require the operations set forth in our findings herein."[17] This statement was additional to the explicit conclusion already noted[18] that the situation presented by the applications was one which required either granting both or denying both. And the findings

[17] The Commission's report stated: "Of the motor-carrier protestants, there is only one—Pierce—which is authorized to transport general commodities to and from all intermediate points along the Valley Route. Pierce did not reinstitute daily operations to and from San Francisco, however, until after the filing of these applications and but a few weeks prior to the hearings herein. Shipper witnesses generally were unfamiliar with the fact that Pierce's operation was daily. There are, of course, certain other motor carriers operating over this route but their authority is either (1) restricted in such a way as to preclude a finding that their service is adequate especially as to intermediate points, or (2) the record definitely establishes that their service to and from San Francisco, is at best negligible. In view of the foregoing, we are of the opinion that public convenience and necessity require the operations set forth in our findings herein."

[18] See note 14.

expressly stated, concerning each application, that the "present and future public convenience and necessity require the extended operations."[19]

Apart from the fact that this was all that the statute required, cf. *United States* v. *Detroit and Cleveland Navigation Co.*, No. 22, O. T. 1945, decided November 5, 1945, and the further fact that there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest.[20] The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind. Only the most hypercritical reading of the findings, and one which ignores the report's explicit statements in many respects, could construe them as meaning only that *each* operation was required by public convenience and necessity without any regard to the competitive consequences of granting *both*. The Commission should not be required to rewrite its report simply to say, redundantly we think, that *both* operations, as well as each, are required by public convenience and necessity.

Appellees further say that, even if the Commission was correct in granting a certificate of public convenience and necessity to O. N. C., it improperly granted such a certificate to Consolidated. Section 207(a) requires that the Commission find "that the ap-

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[19] The Commission rested this ultimate finding in part upon the following statement as to the need for extended operations: "There is no doubt but that a number of shippers desire such proposed services. Each applicant also operates units equipped with mechanical refrigeration, which service certain of the shippers desire for the proper transportation of their shipments. The proposed service will enable shippers to obtain goods more rapidly, resulting in an increase in their businesses. Some of the shippers estimate an increase in their business amounting to several thousand dollars. Practically all of the witnesses prefer a single-line through service. Some of them have used the services of existing carriers and have not found them satisfactory principally because of improper refrigeration or lack of service to intermediate points." See also note 17. The Commission noted in its report that the traffic between San Francisco and Portland was increasing.

[20] The Commission has recognized the value of reasonable competition, cf. Chesapeake & Ohio Ry. Co. v. United States, 283 U. S. 35; United States v. Detroit & Cleveland Navig. Co., No. 22, O. T. 1945, decided November 5, 1945; Inland Motor Freight v. United States, 36 F. Supp. 885; 44 M. C. C. 535, 548, in no case perhaps more clearly than in those presented on this appeal. See also note 15.

plicant is fit, willing, and able properly to perform the service proposed" and the District Court made a finding of fact that "the Commission failed to find, and there is no evidence in the record to support such a finding, that Consolidated is adequately equipped under any conditions."

The court undoubtedly did not mean that there was no finding whatever as to fitness, willingness and ability, for the Commission did make such a finding in the statutory language. What was obviously meant was that such an ultimate finding was not enough, as of course it was not, see *Florida* vs. *United States, supra,* in the absence of a basic finding to support it; and that there was no such basic finding.

We do not agree, however, that there was no such basic finding. The paragraph of the Commission's report set out in the margin[21] was a sufficient finding, though inartistically drawn, concerning Consolidated's financial fitness and ability. Nor was there a lack of evidence to support this.[22]

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[21] "Fitness.—There is no doubt as to O. N. C.'s fitness, financial or otherwise, to conduct the operations herein authorized, although protestants question Consolidated's financial ability to conduct the proposed operation. Protestants contend that if these applications are granted each applicant will operate at a loss. Each applicant of course claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford. Elimination of the cost of transfer at Medford would save approximately fifteen or sixteen hundred dollars a month. Considering the facts heretofore discussed in some detail, we are of the opinion that we should give applicants the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein." See also note 22.

[22] It is true that in 1939 Consolidated had approximately $215,000 of current liabilities in excess of current assets and had hypothecated a great deal of equipment as a means of obtaining capital. Nevertheless, from its inception the company had been financed largely out of earnings and in every year but 1932 had been able to earn profits. Moreover, there was ample testimony that its service was satisfactory and reliable. There was evidence also from which the Commission could find that the additional financial burden which would be imposed by granting Consolidated's application could be met by that company. The amount of additional capital investment needed for terminals and equipment was doubtful. But there was testimony that the intermediate cash outlay necessary for new terminals at Oakland and Sacramento would not be more than $12,000 and that, if additional equipment were needed, Consolidated was in a position to furnish it and have it financed. In addition, because of the considerable distance covered by the new through route, Consolidated would be able to make "a profitable load factor."

On this and other evidence we cannot say that the Commission's finding as to the financial ability of Consolidated to undertake the new service lacked support in the record. For us or the District Court to do so would be to invade the Commission's proper function.

Finally, the District Court remanded the cases for rehearing in order for the Commission, among other things, to determine Consolidated's fitness "to initiate and maintain one of such lines in view of present conditions." This action was unwarranted. The records in the two proceedings were closed in October, 1940. The Commission issued its report and order on March 1, 1943. A petition for rehearing was filed by the appellees and other protestants on April 30, 1943, and was denied by the Commission on August 2, 1943.[23] The certificates were issued on September 7 and 15, 1943. Suit was brought in the District Court on January 13, 1944. The court rendered its decision on September 20, 1944, suggesting that the Commission had improperly denied the petition for rehearing. Its view was that the record was so stale, particularly in view of the influence of the war upon transportation facilities, that application of the doctrine of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, was proper.

That case, as has been indicated more than once, was "promptly restricted . . . to its special facts, *United States* v. *Northern P. R. Co.*, 288 U. S. 490, and it stands virtually alone." *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 515; see also *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 389. Except in the single instance, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City*, *supra*. Only a showing of the clearest abuse of discretion could sustain an exception to that rule. The Commission was well acquainted with the impact of the war upon facilities for transport and upon the transportation business in general. In addition to its own expert knowledge concerning such matters, it had before it not only the facts set forth in the petition for rehearing[24] but also those alleged in the extended replies filed by the applicants.

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[23] In its exceptions to the examiner's report, O. N. C. asked that the proceeding be reopened because of many changes that had occurred since the closing of the record. In its report, the Commission stated: "In its exceptions, O. N. C. also requests a further hearing, but in view of our conclusions herein it is doubtful whether it would still desire such further hearing. Its request for further hearing is hereby denied."

[24] The petition alleged, in part, that "new motor vehicle common carrier operations such as are authorized by the order and which duplicate existing operations are forbidden by orders of the Office of Defense Transportation"; that "since orders of the Office of Defense Transportation prohibit speeds in

We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that ". . . the courts must in a litigated case, be the arbiters of the paramount public interest."[25] This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

The judgment is

Reversed.

Mr. Justice DOUGLAS dissents.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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excess of 35 miles per hour and the promised service would require consistent highway speeds averaging 52 ½ miles per hour outside of cities and other restricted areas, it is certain the service proposed and authorized cannot and will not be given, nor can any service faster than that of existing operators be rendered"; and that "all controlling statements of fact relied upon by the division to sustain its conclusions were as of the date of the report and are now entirely and completely untrue. . . ."

[25] The full sentence is as follows: "While it is true that problems such as these can only be brought to the courts when private interests conceive there has been injury of rights of property, and although the field of judicial review of administrative determination has been narrowly confined, the courts must in a litigated case, be the arbiters of the paramount public interest." 57 F. Supp. 192, 196.